Supreme Court, U.S.
FILED

No. 09- 09-538 OCT 30 2009

OFFICE OF THE CLERK
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IN THE
Supreme Court of the United States

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit erred in ruling that there is zero (or negligible) public interest in disclosure of agency records reflecting to whom and for what an agency disburses funds under a federal spending program, on the ground that those records would not allow the public to monitor the agency's performance of a specific statutory duty to oversee the quality of services performed by the recipients.

2. Whether the D.C. Circuit erred in ruling that such recipients of federal funds have a sufficient privacy interest in such agency records as to clearly outweigh the public interest in disclosure of such records.

PARTIES TO THE PROCEEDING

Petitioner, which was plaintiff-appellee below, is Consumers' CHECKBOOK, Center for the Study of Services. The governmental respondents, defendant-appellants below, are the United States Department of Health and Human Services, the Secretary of Health and Human Services (in her official capacity), and the Acting Administrator of the Centers for Medicare and Medicaid Services (in her official capacity). Also a respondent in this Court is the American Medical Association, which was granted leave to intervene in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Consumers' CHECKBOOK, Center for the Study of Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-35a) is reported at 554 F.3d 1046. The decision of the district court (App. 37a-55a) is reported at 502 F. Supp. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2009. A timely petition for rehearing was denied on June 2, 2009. On August 13, 2009, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 30, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Exemption 6 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6), provides: "This section does not apply to matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

STATEMENT

1. Medicare, the federal program that provides medical coverage for persons over 65 years of age or with certain disabilities, is the nation's largest health insurer, processing more than one billion claims each year, and spending over $400 billion a year.[1] Physicians and other health-care providers may receive reimbursement from Medicare for services they have provided to Medicare beneficiaries if they enroll in the Medicare program. To receive reimbursement, an enrolled physician must submit a claim to Medicare, set-

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[1] *See* 42 U.S.C. §§ 1395 *et seq.*; Dep't of Health and Human Services, *HHS, What We Do, at* http://www.hhs.gov/about/whatwedo.html; Board of Trustees, Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, 2009 Annual Report 5 (2009), *at* http://www.cms.hhs.gov/ReportsTrustFunds/downloads/tr2009.pdf.

ting forth (among other things) the diagnosis, the procedure performed, the place and date of service, and (at the time relevant) the physician's Unique Physician Identifying Number (UPIN) assigned by Medicare. The Department of Health and Human Services (HHS) has authority to exclude a physician from participation in Medicare if, among other things, he has "furnished or caused to be furnished items or services to patients ... substantially in excess of the needs of such patients or of a quality which fails to meet professionally recognized standards of health care." 42 U.S.C. § 1320a-7(b)(6)(B).

Congress and HHS consistently have stressed the importance of ensuring that the health-care services Medicare pays for are of high quality, and that those services are provided in an efficient manner. Congress has charged HHS with "promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which payment may be made" by contracting with Quality Improvement Organizations. 42 U.S.C. § 1395y(g). In 2003, Congress directed HHS to create projects that "examine health delivery factors that encourage the delivery of improved quality in patient care." *Id.* § 1395cc-3(b). A 2006 presidential executive order directs HHS to take steps designed to ensure that Medicare "promote[s] quality and efficient delivery of health care through ... transparency regarding health care quality and price," and "to make relevant information available to [Medicare] beneficiaries, enrollees, and providers in a readily useable manner." Exec. Order No. 13,410, § 1, 11 Fed. Reg. 51,089 (Aug. 22, 2006). HHS also has reaffirmed that Medicare's mission includes "enabling consumers to compare the quality and price of health care services so that they can

make informed choices among individual physicians, practitioners, and providers of services." 72 Fed. Reg. 52,133 (2007).[2]

Waste, fraud, and abuse in the Medicare program have long been significant problems. "Since 1990, [the Government Accountability Office] has considered Medicare at high risk for fraud, waste, abuse, and mismanagement." GAO, *Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised*, GAO 06-813 at *Highlights* (Sept. 2006), *at* http://www.gao.gov/new.items/d06813.pdf.[3] That concern is well-founded. A Senate investigation concluded that, from 2000 through 2007, Medicare paid over 478,500 claims, exceeding $76 million, bearing identification numbers assigned to *deceased* physicians; in 16% of those cases, the doctor whose number was used had

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[2] HHS has taken specific steps to improve quality in the delivery of health care. For example, it has established the Physician Quality Reporting Initiative (PQRI). *See* CMS, *Physician Quality Reporting Initiative, Overview*, *at* http://www.cms.hhs.gov/PQRI/01_Overview.asp#TopOfPage (description of the program); HHS also provides information to patients on choosing the best doctor for surgery. *See, e.g.*, HHS Agency for Healthcare Research and Quality, *Making Sure Your Surgery Is Safe*, *at* http://www.ahrq.gov/consumer/surgery/surgery6.htm.

[3] In a separate 2007 report, GAO found that two to twenty percent of physicians in twelve metropolitan areas engaged in inefficient practice patterns, and concluded that profiling physicians using physician-identifiable data maintained by HHS could help identify such physicians and bring greater efficiency to Medicare-financed care. GAO, *Medicare Integrity Program: Focus on Physician Practice Patterns Can Lead to Greater Program Efficiency*, GAO 07-307 (Apr. 2007), *at* http://www.gao.gov/new.items/d07307.pdf.

been dead more than ten years.[4] At a recent Senate hearing, the Chief Counsel of HHS's Office of Inspector General cited instances in which criminals enrolled as providers in Medicare and stole millions of dollars, payments were made to dead physicians, and patients received kickbacks for cooperating with clinics that billed Medicare for their HIV treatment when they did not have HIV.[5] A recent House report also found an "epidemic" of Medicare fraud.[6]

2. Petitioner is a non-profit organization dedicated to conducting studies of consumer services (including services provided through government programs) and informing the public through reports, magazines and the Internet about consumer information. In 2006, petitioner submitted to the Center for Medicare and Medicaid Services (CMS), the HHS en-

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[4] Senate Perm. Subcomm. on Investigations, *Medicare Vulnerabilities, Payments for Claims Tied to Deceased Doctors* 2 (2008), *at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bffa52a1-d36d-4332-b2dc-cd461f947f8c-.

[5] Statement of Lewis Morris, *Senate Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management, Government Information, Federal Services and International Security, Hearing on Eliminating Waste and Fraud in Medicare and Medicaid* 5-7 (Apr. 22, 2009), *at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bfe22edf-98b6-49fe-a54b-50ad9c176a4b; *see also id.*, transcript of proceedings (available on Lexis transcripts database).

[6] Republican Staff Report, U.S. House of Representatives, Committee on Oversight and Government Reform, *Medicare Experience Suggests Americans Should Expect Massive Fraud with Nationalized Health Care* 3, 6 (Aug. 13, 2009), *at* http://republicans.oversight.house.gov/images/stories/Reports/2009-08-13_Medicare_Fraud_Report.pdf (also citing "out of control fraud" and "fraud occurring by the minute in Medicare").

tity that administers the Medicare program, a request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA request asked CMS to provide a subset of the data contained in the Medicare reimbursement claims forms submitted by physicians in specified states for medical services provided during 2004.[7] The requested data elements include basic facts from the submitted Medicare claims, such as the diagnosis, the type, place, and year or quarter of service, and the physician's UPIN. The data requested do not identify individual patients. *See* C.A. App. 16-17. The data requested also do not specify amounts actually paid by Medicare, although that information could be derived by matching claims that were actually paid to publicly available Medicare fee schedules.

The requested information would allow the public to monitor and evaluate the operation of the Medicare program. For example, with the data petitioner has requested, it will be possible to create counts of the annual volume of procedures of various kinds billed to Medicare by each participating physician (*e.g.*, the volume of coronary artery bypass graft procedures or total hip replacements). With that information, the public can scrutinize whether Medicare is paying physicians to perform services for which they have less than the optimal level of experience.[8] In addition, for procedures

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[7] The original request covered claims submitted by physicians in four states and the District of Columbia; to expedite the process and limit search costs, petitioner agreed to limit its request to physicians in the District.

[8] Research indicates that the volume of certain procedures performed by physicians can affect the quality of services. A recent study using Medicare claims data concluded that surgeons who did fewer than 101 coronary artery bypass graft procedures

for which overutilization is common, this information will allow the public to learn the extent to which Medicare is paying physicians to perform a disproportionate number of procedures. Both kinds of information would shed light on the extent to which Medicare is effective at ensuring that patients receive the appropriate care and services of the appropriate quality, and would allow the public to advocate for improvements in the Medicare program. The requested information also would reveal instances of payments for potentially fraudulent claims—for example, an unrealistically high number of procedures were performed over a given time period, or payments were issued to unlicensed physicians or even dead physicians.[9]

3. CMS initially denied the FOIA request on the ground that no records could be produced without an unreasonable effort. Petitioner appealed that decision within the agency, but when CMS took no action on the appeal for several months, petitioner brought this action in district court under FOIA to compel disclosure of the requested records. At no point in the administrative process did CMS indicate that the requested records fell within any of the exemptions to FOIA, and

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per year had 1.35 times as high a mortality rate for such procedures as surgeons who did more than 162 procedures per year. *See* Birkmeyer, et al., *Surgeon Volume and Operative Mortality in the United States*, 349 New Eng. J. Med. 2117 (2003).

[9] For example, only with physician-identifying information can the public scrutinize whether Medicare is paying claims submitted by doctors who are deceased or who do not perform services of the type billed. Also, only with physician-identifying information can the public determine whether doctors who are performing high risk procedures have adequate training or board certifications, or any disciplinary record.

in March 2007, CMS indicated its intent to release the requested records without redaction, acknowledging as well that "disclosure of the records would reveal meaningful information about government operations or activities." App. 71a. In the district court, HHS moved for summary judgment on the ground that petitioner had sought relief before exhausting its administrative remedies, but it did not invoke any FOIA exemption, and it again stated that it intended to release the documents in full. C.A. App. 39-45, C.A. Supp. App. 3.

HHS then reversed course, and in a "supplement" to its summary judgment motion, invoked for the first time Exemption 6 as a basis for withholding the records. C.A. App. 82-92. HHS now claimed that the requested data could be combined with other publicly available information to calculate physicians' annual Medicare reimbursement amounts, and that any public interest in the requested information would be clearly outweighed by the invasion of physicians' privacy caused by that disclosure.[10]

The district court granted summary judgment to petitioner. The court found the asserted privacy interest to be "minimal," not only because the information requested "concerns only the business income of the

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[10] Among the cases HHS cited was *Florida Medical Ass'n* v. *Department of Health, Educ. & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979) (*FMA*), in which a district court had enjoined HHS' predecessor agency from disclosing a list of physicians along with the total amount each had received from the agency during a given year, but HHS did not argue at that time that the *FMA* injunction barred it from disclosing the records requested in this case. The district court found the *FMA* injunction immaterial because petitioner "seeks different records" than those at issue in *FMA*. App. 47a n.1.

physicians involved and not intimate facts about their personal lives," but also because it "only involves information related to physicians' participation in and compensation from a government program." App. 46a. At the same time, the court recognized a strong public interest in disclosure because the requested physician-identifying information will shed light on the quality of services provided by the Medicare program and generally on "how government funds are spent." App. 43a; *see U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 178 (1991) (requiring balancing of public interest in disclosure with privacy interest under FOIA Exemption 6).

4. A divided panel of the court of appeals reversed, and ruled that the requested records are exempt from disclosure under Exemption 6. App. 17a.[11]

a. The majority first concluded (contrary to the district court) that physicians who submit reimbursement claims to Medicare "have a substantial privacy interest in the total payments they receive from Medicare for covered services." App. 7a. The panel reached that conclusion even though the requested information about claims for government payments would not reveal either a physician's *net* income (because it would not include office operating expenses) or a physician's *total* income (because it would not include income from non-Medicare sources, such as private-paying patients).

The majority also concluded that *no* public interest would be served by disclosure of the requested information. App. 16a. The majority first denied that the

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[11] The majority did not decide whether disclosure of the requested records would be barred by the *FMA* injunction. App. 4a n.3.

data would assist the public in evaluating the quality of health care provided under the Medicare program. For example, the panel concluded that information about the volume of Medicare-reimbursed procedures performed by a physician would have no bearing on the quality of services, because that information would not include procedures performed for non-Medicare patients. App. 10a. (Thus, although the panel concluded that services provided to non-Medicare patients were irrelevant on the privacy-interest side of the balance, it found such services effectively dispositive on the public-interest side.) The panel also rejected petitioner's argument that the requested records could assist the public in determining whether Medicare doctors are providing the services necessary to reach standards of recommended care. App. 11a-12a. According to the panel, even if that information would be useful to the public in evaluating the quality of Medicare-reimbursed health care services, it would not shed light on the "agency's performance of its statutory duties," because it would not "allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake." App. 11a (internal quotation marks omitted).

The majority next concluded that the requested information would have no usefulness in evaluating fraud in the Medicare program. Even though reports expressing concern about Medicare fraud are legion, the court stated that petitioner had not "provided any evidence of alleged fraud the requested data would reveal." App. 12a. The court dismissed an extensive GAO report concluding that Medicare is *especially* vulnerable to fraud, stating that the report "does not raise a cognizable public interest under FOIA in verifying that CMS is adequately detecting fraud." App. 13a.

Finally, the court ruled that the requested data would shed no light on whether HHS was complying with its own transparency initiatives. The panel asserted (without any citation) that "the public is already familiar with the type of data contained in the Medicare claims database," and that "[t]he public does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives. Nor does the public need the data to evaluate whether the steps already taken by CMS are in fact assisting consumers in making informed decisions." App. 15a. The panel rejected as irrelevant that CMS had "stated its intention to provide more information relevant to consumer health care decisions," and stated that CMS had never pledged "to disclose any information to the public that could possibly assist consumers in health care decisions without regard to any countervailing interest." *Id.*

b. Judge Rogers dissented. App. 17a-35a. First, she observed that physicians' privacy interest implicated in disclosure of Medicare reimbursement information, although more than *de minimis*, is "particularly limited," because "the requested data pertains to government funds and would not reveal physicians' take-home earnings." App. 21a.

Second, Judge Rogers found "a commanding and important public interest in disclosure of the data [petitioner] seeks." App. 22a. She noted that, "[b]ecause Medicare distributes extensive amounts of public funds, there is a special need for public oversight of HHS' activities in administering Medicare." App. 23a (internal quotation marks omitted). HHS "has a statutory and regulatory duty to evaluate and work to improve the quality, cost, and efficiency of services delivered by Medicare providers," and releasing the data requested

"would enable members of the public to evaluate HHS's effectiveness in fulfilling its duties." App. 24a-25a. At a minimum, even if the data requested would not conclusively demonstrate HHS's effectiveness, it would have "incremental value for ascertaining the quality of services performed at both the provider level and program-wide." App. 26a.

Judge Rogers also explained that the requested data "would shed light on HHS's fraud-detection and fraud-prevention efforts." App. 29a. For example, the information "could identify providers who perform a suspiciously large number of procedures in a given time period or submit claims for procedures that are outside their own practice areas." *Id.* (quotation marks and brackets omitted). The information could also be used to determine "whether Medicare is reimbursing any providers who have already been excluded from Medicare for misconduct." App. 29a-30a. Judge Rogers stressed that, even though there might already be significant government oversight of Medicare-enrolled physicians, the public has an interest in knowing how well the government is carrying out that function, for the fundamental purpose of FOIA is "to permit the public to decide *for itself* whether government action is proper." App. 30a. Given the strong public interest in disclosure and the limited privacy interest affected, Judge Rogers concluded that HHS had not met its burden to show that release of the requested data "would constitute a *clearly unwarranted* invasion of personal privacy," as Exemption 6 requires.[12]

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[12] Judge Rogers also noted that the *FMA* injunction "is limited to the recertified class" in that case, which includes only (a) physicians in Florida, and (b) physicians who are members of the

c. The court denied a petition for rehearing en banc, with three judges dissenting. App. 59a-60a.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT ERRED IN HOLDING THAT, FOR PURPOSES OF EXEMPTION 6, THE INFORMATION REQUESTED MUST PERTAIN TO A SPECIFIC STATUTORY DUTY, RATHER THAN SHED LIGHT ON THE FUNCTIONING OF THE AGENCY MORE GENERALLY

The D.C. Circuit committed a serious error with profound implications in holding that information requested under FOIA must relate to a specific statutory agency duty in order to establish a public interest cognizable under Exemption 6. This requirement of a specific statutory agency duty is without precedent and is irreconcilable with the core purpose of FOIA, which is "to open agency action to the light of public scrutiny," *Department of Air Force* v. *Rose*, 425 U.S. 352, 372 (1976)—in other words, to let citizens inform themselves about "what their government is up to." *U.S. Dep't of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 773 (1989).

The public interest in monitoring agency performance is hardly limited to circumstances in which the agency is pursuing a highly specific statutory function, as opposed to carrying out its broader mandates (or even acting without statutory warrant altogether).

American Medical Association. App. 35a. She therefore would have affirmed, as to physicians who are not members of that class, the district court's ruling that *FMA* does not bar release of the requested records, and would have remanded the case to the district court for further proceedings on the scope of the injunction. *Id.*

FOIA reflects Congress's judgment that agencies must ultimately be accountable to the public for all of their actions, and it would serve little purpose to parse agency actions into those serving a specific statutory duty and those in aid of the agency's general authority. The context of Medicare provides an excellent example of why such a division makes little sense: as the D.C. Circuit acknowledged, HHS is generally responsible for overseeing the massive Medicare program, and statutes also charge HHS generally with promoting quality in Medicare services.[13] How HHS carries out these statutory obligations is surely a matter of public significance. But according to the D.C. Circuit, these general statutes did not create a cognizable public interest in monitoring how well HHS is fulfilling its statutory duty to promote quality, because "[t]he requested information must 'shed[] light on an agency's performance of its statutory duties' " (App. 7a) and "we fail to see how the requested information will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake" (App. 11a).

The D.C. Circuit's holding has no basis in the language of FOIA or this Court's case law, and it erects a senseless barrier to obtaining information about agency

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[13] *See* App. 8a-9a (recognizing that Congress charged HHS with "promoting the quality of services" (citing 42 U.S.C. § 1395y(g)), that "CMS has certain responsibilities to promote quality healthcare for Medicare beneficiaries," and that CMS has discretion to exclude from participation in Medicare an individual or entity that "has furnished or caused to be furnished items or services to patients ... of a quality which fails to meet professionally recognized standards of health care" (citing 42 U.S.C. § 1320a-7(b)(6)(B))).

action, undermining FOIA's objective of government transparency. In addition, it may conflict with the forthcoming decision of the Eleventh Circuit in a similar case involving the application of Exemption 6 to Medicare reimbursement records. *See Alley* v. *HHS*, No. 08-16914-HH (11th Cir.). In that case, the Eleventh Circuit indicated its preliminary view of the merits by denying a stay of the district court's order to release the records and subsequently denying a motion for reconsideration of its order denying a stay. *Id.*, orders dated Feb. 4 and 27, 2009. (Justice Thomas subsequently granted a stay pending appeal of the release order on March 25, 2009.) Oral argument in *Alley* was held on September 23, 2009; at a minimum, the Court should hold this petition until the Eleventh Circuit issues its decision in the near future.

A. The D.C. Circuit's Requirement Of A Link To A Specific Statute Has No Support In This Court's FOIA Case Law

The D.C. Circuit's holding that requested information must shed light on an agency's specific statutory duty is grounded in a misreading of this Court's opinion in *U.S. Dep't of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989). App. 7a (citing *Reporters Committee*). Nowhere in that opinion did the Court establish such a requirement.

Reporters Committee involved a request for the "rap sheet" of a member of an organized-crime family. 489 U.S. at 757. Although the government asserted that the information was exempt from disclosure under Exemptions 6 and 7(C), the Court considered only the

application of Exemption 7(C).[14] *Id.* at 757, 767 n.12 ("there is no occasion to address the application of Exemption 6").

The Court held that Exemption 7(C) covered the requested information, reasoning that, in order to warrant disclosure, the requested information must relate to the " 'basic purpose of [FOIA] to open agency action to the light of public scrutiny.' " *Reporters Comm.*, 489 U.S. at 772. As an example of information that fulfills FOIA's statutory purpose of telling the people " 'what their government is up to,' " the Court stated: "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 773. Nowhere did the Court state or imply, however, that the requested information must relate to an agency's functions under a specific statute. In fact, the Court held that Exemption 7(C) applied, not because the FBI had no statutory duty to maintain criminal records, but rather because the requested records—which related to one individual's past arrests and convictions—did not in any way shed light on the functioning of the agency itself. By contrast, here, petitioner has requested records of claims for reimbursement *by an agency*, and those records will shed significant light on how that agency functions, as discussed below (pp. 22-25, *infra*).

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[14] Exemption 7(C) exempts from FOIA's disclosure requirement "records or information compiled for law enforcement purposes, but only to the extent that the production of such [materials] ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) is therefore considerably more protective of privacy than Exemption 6, where the privacy interest must "substantially outweigh" the public interest. *Reporters Comm.*, 489 U.S. at 756.

The Court has extended to Exemption 6 the requirement of *Reporters Committee* that the requested information reveal how the agency functions. *See U.S. Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495-496 (1994); *U.S. Dep't of State* v. *Ray*, 502 U.S. 164, 177-178 (1991). Yet in the three cases analyzing Exemption 6 since *Reporters Committee*, the Court has never articulated a requirement that a FOIA requester identify a specific statutory agency duty as a prerequisite to finding a public interest cognizable for purposes of the FOIA analysis. *See Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam); *FLRA*, 510 U.S. 487; *Ray*, 502 U.S. 164.

To the contrary, the Court twice has found a public interest in disclosure cognizable under FOIA without first identifying any specific statutory duty to which the requested information related. In *Ray*, the Court considered whether the redaction of interviewees' names from State Department interview reports was justified under Exemption 6. 502 U.S. at 168-169. The interviewees were Haitian nationals who had been involuntarily returned to Haiti from the United States. *Id.* at 167-168. After quoting the same passage relating to statutory duties from *Reporters Committee* on which the D.C. Circuit relied, the Court held that "the Court of Appeals properly recognized that the public interest in knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees is cognizable under FOIA." *Id.* at 178. Yet in finding a public interest cognizable under FOIA, neither this Court nor the court of appeals below identified any specific statutory duty pursuant to which the State Department was acting. (Ultimately, the Court concluded that the names of the interviewees were properly withheld under Exemption 6

because they were unnecessary to further that public interest.)

Similarly, in *National Archives & Records Administration* v. *Favish*, 541 U.S. 157 (2004), the Court considered whether the government could properly withhold under Exemption 7(C) photographs of the body of Vince Foster, Deputy Counsel to President Clinton. Although it ultimately held that the records could be withheld under Exemption 7(C), the Court found that "[t]he Court of Appeals was correct ... to recognize as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death." *Id.* at 173. Yet, just as in *Ray*, neither this Court nor the court of appeals below identified any statute pursuant to which various agencies and other governmental bodies investigated Foster's death. Indeed, the court of appeals' reasoning on the public interest prong was limited to the following: "Favish's ... request is in complete conformity with the statutory purpose that the public know what its government is up to." *Favish* v. *Office of Indep. Counsel*, 217 F.3d 1168, 1172 (9th Cir. 2000).

Indeed, the D.C. Circuit itself reached a similar result in another case decided less than a year before this one. In *Multi Ag Media LLC* v. *Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the D.C. Circuit found a "significant public interest" in disclosure of information used by the Department of Agriculture to make subsidy and benefit determinations. *Id.* at 1231-32. Yet the court did not cite a single statute pursuant to which the agency acted.

The court of appeals' rigid requirement that a FOIA requester tie the asserted public interest to a specific statute has no basis in the text of FOIA or the

case law of the Court. No other court has ever demanded such a showing as a prerequisite for establishing a cognizable public interest under Exemption 6, and other courts have not hesitated to find a public interest cognizable under FOIA without any inquiry into whether a statute—specific or even general—mandated that the agency act in accordance with that public interest. As long as the requested information reveals how the agency functions, there is a public interest cognizable under FOIA in its release. *Reporters Comm.*, 489 U.S. at 772-773. Nothing more is required.

B. A Requirement That Information Requested Under FOIA Be Linked To A Specific Statutory Duty Would Undermine The Basic Philosophy Of Openness Reflected In FOIA And Deny The Public Information When It Is Needed Most

A rule requiring a link to a specific statute to establish a cognizable public interest would turn FOIA on its head. There are many instances in which agencies act under highly general statutes rather than highly specific ones, but the public has no lesser interest in monitoring agency performance in those situations. To the contrary, the public has a particularly significant interest in those situations in determining whether an agency is exceeding or abusing its authority and whether adjustment to the agency's authority might be needed. Indeed, in some cases an agency might even act without statutory authority; when that is the case, the need for disclosure would seem to be particularly strong.

Agencies in practice do not always act pursuant to a specific statutory mandate. Examples abound where agencies enact regulations pursuant to a broad, general

grant of authority from Congress, but no specific statute pertaining to the specific subject matter of the regulation exists. One example is the grant of general authority to the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code]." 26 U.S.C. § 7805(a). Courts have recognized that the Internal Revenue Service can, and has, issued regulations under this general grant of authority. *See, e.g.*, *Khan* v. *United States*, 548 F.3d 549, 554 (7th Cir. 2008); *Bankers Life & Cas. Co.* v. *United States*, 142 F.3d 973, 978 (7th Cir. 1998). Such broad grants of authority to issue necessary regulations are common.[15]

Moreover, it is often unclear—and ultimately of little moment—whether an agency is acting under a specific or a general statutory framework. For example, in *Haig* v. *Agee*, 453 U.S. 280 (1981), the Court considered the Secretary of State's authority to revoke passports. The pertinent statute, the Passport Act of 1926, 22

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[15] *See, e.g.*, 12 U.S.C. § 1462a(b)(2) (authorizing the Director of the Office of Thrift Supervision to "prescribe such regulations and issue such orders as the Director may determine to be necessary for carrying out [the Home Owners' Loan Act]"); *id.* § 1463(a)(2) (authorizing the Director of the Office of Thrift Supervision to "issue such regulations as the Director determines to be appropriate to carry out the responsibilities of the Director or the Office"); 38 U.S.C. § 7304(a) ("Unless specifically otherwise provided, the Under Secretary for Health shall prescribe all regulations necessary to the administration of the Veterans Health Administration."); *see also National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 351 (2002) (Thomas, J., dissenting) (noting that the FCC has several options for regulating rates for attachments providing commingled cable television programming and high-speed Internet access, including "the FCC's general authority to define 'just and reasonable' rates pursuant to § 224(b)(1)").

U.S.C. § 211a, gives the Secretary power only to "grant and issue" passports, but not to revoke them. Nonetheless, as the Second Circuit later explained, in *Haig* "[t]he Court noted that Congress had not specifically authorized the revocation of passports in such circumstances; rather the Secretary had promulgated the regulation pursuant to its general statutory authority to issue passports .... The Court nonetheless upheld the Secretary's exercise of discretion in developing and enforcing the policy .... The Court focused on the broad rule-making authority granted in the statute." *Weinstein* v. *Albright*, 261 F.3d 127, 138-139 (2d Cir. 2001). If a litigant requested information under FOIA relating to passport revocations, surely that information would show what the government was up to, but just as surely it would fail the D.C. Circuit's test, since it would not be the case that "the requested information will allow the public to evaluate the performance of [a] specific ... program[] [the agency] has a statutory duty to undertake." App. 11a.

This case well demonstrates why the court of appeals' "specific statutory duty" requirement makes little sense. CMS has general authority to operate the Medicare program, and general statutes also require CMS to promote quality in the Medicare program. *See* p. 14 & n.13, *supra*. The agency has a duty to act in accordance with that mandate. Yet the court held that there is no public interest in disclosure because there is no specific statute creating a quality-promoting program within CMS. Thus, in the view of the court of appeals, the public interest in monitoring what the agency has done turns on how precisely the Congress has charged the agency to take action. It is difficult to articulate the justification for such a rule, which would

seem to make agencies least accountable when they have the most discretion.

The court of appeals' rule thus undermines FOIA's objective of exposing the workings of government to the public. FOIA reflects " 'a general philosophy of full agency disclosure' " and "disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 360-361. In keeping with that overarching purpose, the exemptions to disclosure under FOIA "must be narrowly construed." *Id.* at 361. The court of appeals' decision is not faithful to those core principles.

C. Petitioner Has Articulated Several Important Public Interests That Are Cognizable Under FOIA

Once it is clear that there is a cognizable public interest in everything that an agency is "up to"—and not just the agency's implementation of highly specific mandates—it also is clear that there is a public interest in the records that petitioner has sought in this case. Those records will allow the public to monitor CMS's activities in at least three respects: its efforts to promote quality in the provision of medical services, its efforts to combat fraud, and its compliance with its own transparency initiatives. Each of these reasons for disclosing the requested data constitutes a legitimate public interest cognizable under FOIA that the D.C. Circuit erred in refusing to recognize.

First, the requested data will allow the public to monitor HHS's compliance with its general statutory obligation to promote quality in health care.[16] One way

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[16] Several statutes charge HHS with promoting the quality of medical services that are delivered to patients. HHS is charged

of accomplishing this will be to tabulate the number of times that Medicare-enrolled physicians have performed particular procedures, which numerous studies have demonstrated correlates to the quality of care the physician provides. *See* App. 25a-26a (Rogers, J., dissenting); Pet. C.A. Br. 22-23. Indeed, the White House Counsel of Economic Advisers recently noted that "when a patient lacks information on the number of times a provider has performed a particular procedure, he or she may choose to go to a low-volume hospital for a complex procedure, even though there is very good evidence that this choice will put him or her at higher risk of complications and death." Executive Office of the President, Council of Economic Advisers, *The Economic Case for Health Care Reform* 16 (June 2009) (Council of Economic Advisers Report), *at* http://www.whitehouse.gov/assets/documents/CEA_Health_Care_Report.pdf.[17] The requested records can also be used

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generally with "promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services." 42 U.S.C. § 1395y(g). The statutory scheme also authorizes HHS to create various programs to measure quality. *Id.*, *id.* §§ 1320c *et seq.* (authorizing the Secretary of HHS to contract with Quality Control Peer Review Organizations in order to promote quality in services reimbursed by Medicare); *id.* § 1395cc-3(b) (authorizing creation of health care quality demonstration programs to promote quality in patient care). In addition, CMS has discretion to exclude physicians from participation in Medicare for reasons including submission of charges for services "of a quality which fails to meet professionally recognized standards of health care." *Id.* § 1320a-7(b)(6)(B).

[17] Indeed, HHS itself advises patients contemplating a surgical procedure to choose a physician who "has plenty of experience doing it." HHS Agency for Healthcare Research and Quality, *Making Sure Your Surgery Is Safe*, *at* http://www.ahrq.gov/consumer/surgery/surgery6.htm.

to assess the extent to which physicians are providing all services required to reach standards of recommended care, and to explore whether CMS is reimbursing physicians with poor quality evaluations or insufficient board certifications. *See* Pet. C.A. Br. 23-24; *see also* Council of Economic Advisers Report 16 (citing lack of physician performance measurement and consumers' lack of information on physician quality as sources of inefficiency in the current U.S. health care system).

Second, the requested data will allow the public to evaluate the extent to which CMS is issuing reimbursements for fraudulent claims or unnecessary procedures.[18] The data will show, for example, whether a physician submits claims for a suspiciously large number of procedures in a given time period, performs a certain procedure far more than the norm, or submits claims for procedures that are outside of his or her known practice area. With this data, the public may also identify instances in which Medicare is paying claims to providers who are long deceased.[19]

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[18] The statutory scheme vests HHS with discretion to deny payments in cases where physicians are not qualified or fraud may be present. Grounds for which HHS has discretion to exclude physicians include license revocation or suspension, 42 U.S.C. § 1320a-7(b)(4), fraud or kickbacks, *id.* § 1320a-7(b)(7), a prior conviction relating to fraud, *id.* § 1320a-7(b)(7), and charges in excess of the physician's usual charges, *id.* § 1320a-7(b)(6)(A), or of the patient's needs, *id.* § 1320a-7(b)(6)(B). HHS is precluded from reimbursing for services that are not "reasonable and necessary for the diagnosis or treatment of illness or injury." *Id.* § 1395y(a)(1)(B).

[19] Contrary to the D.C. Circuit's statement, this is not a case where the requester made "no particular showing that any evi-

Finally, the requested data would allow the public to monitor HHS's own self-proclaimed efforts to ensure greater transparency. Respondent has stated that HHS has undertaken steps towards providing consumers with more information about service providers. Resp. C.A. Br. 39-40; *see also* Pet. C.A. Br. 30-31.

In sum, statutes governing Medicare charge HHS with paying out nearly $60 billion of federal money to physicians who submit claims for reimbursement. *See* p. 30, *infra*. HHS is charged with promoting quality in the provision of services and has broad discretion to exclude physicians who are improperly qualified or suspected of fraud. Just as in the many other cases where courts have recognized a compelling public interest, here too the public has a strong interest in monitoring how HHS disburses the massive federal funds with which it is entrusted, and in what manner it exercises the discretion that it is granted by statute.

II. THERE IS ALWAYS A PUBLIC INTEREST IN MONITORING THE GOVERNMENT'S EXPENDITURE OF PUBLIC FUNDS

Not only did the D.C. Circuit err in failing to find any public interest in monitoring HHS's operation of the Medicare program; it also fundamentally erred in failing to recognize the public's compelling interest in

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dence points with credibility to some actual misfeasance or other impropriety." *Favish*, 541 U.S. at 173. Petitioner submitted evidence that "[s]ince 1990, [the GAO] has considered Medicare at high risk for fraud, waste, abuse, and mismanagement." GAO, *Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised*, GAO 06-813 at *Highlights* (Sept. 2006), *at* http://www.gao.gov/new.items/d06813.pdf. The GAO report also states that "Medicare's susceptibility to fraud is growing" and represents an "ongoing risk." *Id.* at 30.

monitoring how the government spends taxpayers' money. The point is fundamental to a republican form of government: "The protection of the public fisc is a matter that is of interest to every citizen." *Brock* v. *Pierce County*, 476 U.S. 253, 262 (1986).

By holding that "the requested data does not serve any FOIA-related public interest in disclosure" (App. 16a-17a) the D.C. Circuit opened a gulf between itself and a large number of courts that have held that there is a compelling public interest in monitoring how the government spends money under federal programs. This public interest is becoming even more compelling in an era in which massive government programs are on the rise. As agencies are entrusted to disburse increasing sums of federal money, the potential for waste or misuse, and consequently the need for public oversight, become more pronounced.

A. Both In The FOIA Context And More Generally, Courts Have Recognized A Compelling Public Interest In Monitoring How The Government Disburses Public Funds

Courts have recognized that the public interest in disclosure of agency records is at its highest when the requested information would shed light on how the government disburses public funds and might expose waste, fraud or mismanagement of those funds. Several courts have made this point in the Exemption 6 context specifically. In *News-Press* v. *U.S. Dep't of Homeland Sec.*, 489 F.3d 1173 (11th Cir. 2007), the Eleventh Circuit considered whether records shedding light on FEMA's disbursement of disaster assistance funds could be withheld under Exemption 6. Characterizing the public interest involved as "undeniable," "powerful," "substantial," and "enormous," the Elev-

enth Circuit explained: "We easily conclude ... that the asserted interest in learning whether FEMA is a good steward of (sometimes billions of) taxpayer dollars ... is one which goes to 'the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.' " *Id.* at 1192, 1196, 1206. The court cited a report by Senator Lieberman that applies with equal force to the Medicare context: " 'The critical nature of [disaster] assistance makes reports of waste, mismanagement and outright fraud particularly disturbing. We cannot sweep such allegations under the rug; we must face them head-on to preserve public confidence in this critical program.' " *Id.* at 1206 (citing Sen. Joseph I. Lieberman, *Press Release, Senators Collins and Lieberman: Investigation Reveals Waste, Mismanagement and Fraud in FEMA's Disaster Aid Program in Miami-Dade* (May 18, 2005), *at* http://Lieberman.senate.gov/newsroom/release.cfm?id=237837).

Other circuits similarly have found a compelling public interest in analogous circumstances. In one case, the First Circuit considered a FOIA request for information concerning individuals whose mortgages were insured under the National Housing Act and who were entitled to receive reimbursements from HUD upon the termination of the insurance. *Aronson* v. *U.S. Dep't of Housing & Urban Dev.*, 822 F.2d 182 (1st Cir. 1987). The court found a "strong public interest" under Exemption 6, observing that "[t]he public interest is manifestly served by the disclosure and consequent disbursement of funds the government owes its citizens." *Id.* at 185. The D.C. Circuit itself reached the same conclusion in a case concerning the application of Exemption 6 to records of farm data maintained by the United States Department of Agriculture (USDA) and

relevant to its agricultural and subsidy benefit programs. *Multi Ag Media*, 515 F.3d at 1226. The court found that a public interest existed because "the public has a particular and significant interest in the information Multi Ag seeks. USDA uses this information in the administration of its subsidy and benefit programs, and there is a special need for public scrutiny of agency action that distributes extensive amounts of public funds in the form of subsidies and other financial benefits." *Id.* at 1232-1233. Courts have come to similar conclusions in other FOIA cases, finding a significant public interest in monitoring how the government spends (or, potentially, misspends) its money.[20]

In contexts other than FOIA as well, courts have identified a strong public interest in uncovering potential waste or fraud in disbursement of government funds. In particular, in the First Amendment context, speech concerning possible misuse of government funds is considered a matter of core public interest. *See, e.g.*,

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[20] *See Cochran* v. *United States*, 770 F.2d 949, 956-957 (11th Cir. 1985); *Washington Post Co.* v. *U.S. Dep't of Agric.*, 943 F. Supp. 31, 36 (D.D.C. 1996); *Aronson* v. *IRS*, 767 F. Supp. 378, 392 (D. Mass. 1991) (reversed-in-part on different grounds); Barkas, *Nuking Freedom of Information and Community Right To Know: How Post-9/11 Secrecy Politics Could Make America Less Safe*, 28 Environs Envtl. L. & Pol'y J. 199, 214-215 (Spring 2005) ("The FOIA is instrumental in helping public interest groups expose wasted taxpayer funds on embarrassing, costly or dangerous agency pet projects. Watchdog groups ... use FOIA requests to expose wasteful or otherwise questionable government spending. Citizen groups have used the FOIA to expose excessive or suspect government spending on such diverse subjects as the Microsoft litigation, maintenance costs of a New York Courthouse, unnecessary road-building and timber giveaways, and the award of Iraq War defense and reconstruction contracts.").

Marohnic v. *Walker*, 800 F.2d 613, 616 (6th Cir. 1986) (finding, in First Amendment case involving alleged retaliation for speech to Kentucky Attorney General relating to possible Medicaid fraud, that "Marohnic's speech to the Kentucky Attorney General's investigators concerned fraudulent billing by the Board. Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law."); *Rookard* v. *Health & Hosp. Corp.*, 710 F.2d 41, 46 (2d Cir. 1983) ("An allegation of corrupt and wasteful practices at a large municipal hospital, made to the city official empowered to investigate such charges, obviously involves a matter of public concern."); *Czurlanis* v. *Albanese*, 721 F.2d 98, 104 (3d Cir. 1983) (holding that speech was of public concern when the speaker "challenged practices of the Division of Motor Vehicles and of the County government generally that he considered inefficient, wasteful, and possibly fraudulent and ... protested the waste of taxpayer money and alleged serious deficiencies in record keeping"). Quite simply, "there is an obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large," *United States* v. *Suarez*, 880 F.2d 626, 630 (2d Cir. 1989), and the D.C. Circuit erred in concluding otherwise.

B. The Same Public Interest Is At Stake Here, And Is Becoming More Compelling Every Day

The well-established public interest in monitoring how government agencies disburse federal funds is especially compelling in the case of Medicare. Medicare costs $432 billion a year and is the third-most expensive federal program (behind only the military and social

security).[21] In 2004, the year for which petitioner requested records, the government spent $58.3 billion through Medicare on physician services alone.[22] As discussed above, Medicare is rife with potential for waste, fraud, and abuse, as both Congress and HHS have frequently recognized. *See* pp. 4-5, *supra*. Given the fiscal stakes, the public's interest in monitoring how Medicare spends the taxpayers' money is particularly compelling, and is not confined to situations where HHS is carrying out a highly specific statutory duty to oversee the performance of the recipients of public funds, as the D.C. Circuit believed.

Moreover, the need for public oversight of agency expenditure of federal funds is increasing every day. Recent years, and the last year in particular, have seen massive increases in the size of government programs, resulting in a corresponding increase in federal funds that agencies are entrusted to manage or disburse. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, Div. A, 112 Stat. 3765 (authority to purchase

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[21] *See* Board of Trustees, *Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*, 2008 Annual Report 2 (2008), *at* http://www.cms.hhs.gov/ReportsTrustFunds/downloads/tr2008.pdf.

[22] *See* Board of Trustees, *Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*, 2005 Annual Report 4 (2005), *at* http://www.cms.hhs.gov/ReportsTrustFunds/downloads/tr2005.pdf.

and insure troubled financial assets). An even greater expansion of government spending appears on the horizon. Yet the D.C. Circuit's holding would deny the public the means to monitor the disbursement of money by federal agencies at the time when such oversight is needed most.

A recent report by the Heritage Foundation on spending by the federal government found that "[s]ince 2001, spending has grown across the board. Discretionary spending has expanded 74 percent faster than inflation .... Entitlement spending has reached a record 13 percent of GDP—not even counting the additional 5 percent of GDP spent on financial bailouts this year. Other areas receiving large increases since 2001 include: anti-poverty programs (57 percent faster than inflation), K-12 education (169 percent), veterans spending (72 percent), and Medicare (59 percent). And despite all the pressing national priorities, lawmakers approved over 10,000 earmarks last year at a cost of $20 billion. Simply put, all parts of government are growing." Riedl, *Heritage Special Report: Federal Spending by the Numbers 2009*, at 1 (Heritage Foundation July 27, 2009), *at* http://www.heritage.org/research/budget/upload/sr_63.pdf. The report also noted a "huge jump" in the growth in spending in 2009. *Id.* at 4. With regard to Medicare in particular, the report noted that Medicare spending has jumped 68% since 2001, *id.* at 10, that "[h]ealth care fraud is estimated to cost taxpayers more than $60 billion annually," *id.* at 14, and that "[m]edicare officials recently mailed $50 million in erroneous refunds to 230,000 Medicare recipients," *id.* at 15.

Indeed, there is little doubt that we are currently in the midst of a "historic" surge in spending by the federal government. *See* Riedl, *The Obama Budget:*

Spending, Taxes, and Doubling the National Debt, in Backgrounder, No. 2249, at 5 (Heritage Foundation Press, Mar. 16, 2009), *at* http://www.heritage.org/Research/Budget/upload/bg_2249.pdf.[23] As government spending increases, so does the potential for waste, misuse, fraud, and poor implementation. Consequently, the need for the public to keep a vigilant eye on the activities of the government is greater today than perhaps at any other time in recent history. With information shedding light on agency disbursements, the public can expose irregularities and petition for stronger safeguards. This is among the central purposes of FOIA. Yet it cannot occur if the public does not have access to government records in the first place. The D.C. Circuit's holding that there is no public interest in monitoring an agency's disbursement of federal funds thus sharply curtails public access to information just when it is needed most.

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[23] *See also* Raasch, *The Era of Big Government Arrives*, USA Today (Feb. 26, 2009), *at* http://www.usatoday.com/news/opinion/columnist/raasch/2009-02-26-2009-02-26-newpolitics_N.htm ("The federal government is bigger, costlier and more involved than ever in Americans' lives.... [U]nprecedented growth has come in the last four months through trillion-dollar-plus spending, tax cuts and debt to bail out banks, automakers and homeowners behind on their mortgages."); Dorf, *The Era of Big Government is Starting Over: Will the Obama Administration Transform American Constitutionalism in the Way that FDR Did?* (Dec. 30, 2008), *at* http://writ.news.findlaw.com/dorf/20081230.html ("[A] new era of very big government is just beginning.").

III. THE D.C. CIRCUIT ERRED IN HOLDING THAT THE REQUESTED RECORDS COULD BE WITHHELD UNDER EXEMPTION 6 BECAUSE A "SUBSTANTIAL" PRIVACY INTEREST OUTWEIGHED THE PUBLIC INTEREST IN DISCLOSURE

For the reasons given above, the court of appeals erred in holding that there was no (or negligible) public interest in disclosure of the records sought by Petitioner. That erroneous ruling enabled the court of appeals to hold that the records could be withheld under Exemption 6 (which requires a balancing of public and private interests), because " 'even a modest privacy interest[] outweighs nothing.' " App. 17a. Because there is a significant public interest in disclosure of the records at issue, it is clear that, to the extent the court of appeals even balanced the relevant interests, the outcome of the balancing cannot be upheld.

There is no need, however, for this Court to remand the case to the court of appeals for "rebalancing." Exemption 6 requires disclosure unless the privacy interest *clearly outweighs* the public interest in disclosure. *See* 5 U.S.C. § 552(b)(6) (disclosure not required if it "would constitute a *clearly unwarranted* invasion of personal privacy" (emphasis added)). The balance is thus tilted heavily in favor of disclosure. *See Ray*, 502 U.S. at 177. And even to the extent that a privacy interest might be implicated in the requested records, that privacy interest does not clearly outweigh the public interest in disclosure.

Any privacy interest at issue here is in fact quite limited. In the first place, the requested records do not themselves reveal how much physicians are paid for procedures; that information must be derived by combining the requested data with other information, in-

cluding a physician fee schedule. Second, any information revealed would be limited to physicians' receipt of government funds. Third, the requested information would not allow anyone to calculate a physician's overall economic situation, because it would not reveal either the physicians' total income or net income (after expenses). At any rate, even if a cognizable privacy interest exists, it cannot outweigh the compelling public interest in disclosure of the requested information. Once that public interest has been duly recognized, it is clear that the requested information cannot be withheld on Exemption 6 grounds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5343

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,
Appellee

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES et al.,
Appellants

AMERICAN MEDICAL ASSOCIATION,
Intervenor.

Argued Oct. 8, 2008.
Decided Jan. 30, 2009

Appeal from the United States District Court
for the District of Columbia (No. 06cv02201)

OPINION

Before: HENDERSON, RANDOLPH and ROGERS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

Separate opinion filed by *Circuit Judge* ROGERS, concurring in part and dissenting in part.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Consumers' Checkbook, Center for the Study of Services (CSS) filed this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, seeking from the United States Department of Health and Human Services (HHS) records for all Medicare claims submitted to HHS by physicians in several localities during 2004. The district court granted summary judgment in CSS's favor, concluding that the records are not exempt from disclosure under FOIA Exemption 6, *id.* § 552(b)(6). *See Consumers' Checkbook, Ctr. for Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 502 F. Supp. 2d 79, 83-86 (D.D.C. 2007) (Memorandum Opinion). For the reasons set forth below, we reverse the judgment of the district court.

I.

On March 27, 2006, CSS submitted a FOIA request to the Centers for Medicare and Medicaid Services (CMS), a division within HHS, seeking a subset of data elements from all Medicare claims submitted by certain physicians in 2004. The data elements include the diagnosis, the type and place of service and the Unique Physician Identifying Number (UPIN) of the physician who performed the services. CSS limited its request to physicians in the District of Columbia, Illinois, Maryland, Washington and Virginia. It did not request data that identifies Medicare beneficiaries. At the time of the request, every physician was assigned a UPIN when he enrolled in Medicare.[1] A physician's name, of-

[1] Health service providers and suppliers must enroll in the Medicare program "[t]o receive payment for covered Medicare items or services from either Medicare ... or a Medicare beneficiary." 42 C.F.R. § 424.505. CMS discontinued the UPIN as of June

fice zip code, medical or surgical specialty and UPIN are publicly available on the internet. The fees a physician receives from Medicare for performing a specific service or procedure are also publicly available on the internet. Combined with the publicly available fee schedule, the data requested by CSS can be used to calculate the total payments Medicare made to any individually identified physician for claims submitted in 2004.

CMS denied the FOIA request and CSS appealed to the CMS Deputy Administrator. On December 26, 2006, CSS filed a complaint in district court under FOIA seeking injunctive relief. Both parties moved for summary judgment. HHS argued that the requested records are exempt from disclosure under FOIA Exemption 6. Alternatively, it argued that a twenty-nine-year-old permanent injunction issued by the United States District Court for the Middle District of Florida bars disclosure of the requested data from physicians who are American Medical Association (AMA) members. *See Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979). In an opinion and order filed August 22, 2007, the district court

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2007 and replaced it with the National Provider Identifier (NPI). *See* CMS, UPIN Directory, http://www.cms.hhs.gov/NonIdentifiableDataFiles/08_UniquePhysicianIdentificationDirectory.asp (last visited Jan. 23, 2009). The NPI is a unique identifier used to identify each health care provider or supplier. *See* CMS, The Who, What, When, Why & How of NPI: Information for Health Care Providers (2006), http://www.cms.hhs.gov/MedicareProviderSupEnroll/downloads/EnrollmentSheet_WWWWH.pdf. The NPI registry may be searched online at https://nppes.cms.hhs.gov/NPPES/NPIRegistryHome.do.

granted summary judgment in CSS's favor and this appeal followed.[2] Memorandum Opinion at 81, 89.

II.

HHS appeals the district court's grant of summary judgment as to the requested Medicare records the court held were not exempt from disclosure under FOIA Exemption 6.[3] We review the district court's grant of summary judgment de novo. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145 (D.C. Cir. 2006). FOIA provides that an agency must disclose all records upon request by "any person," 5 U.S.C. § 552(a)(3), unless a statutory exemption applies. *Id.* § 552(b). FOIA Exemption 6 provides that FOIA "does not apply to matters that are ... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). It is undisputed that the requested Medicare records are personnel, medical, or "similar files." *See* Memorandum Opinion at 83. Accordingly, we must

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[2] The district court also held that CSS is entitled to the requested information without charge under 5 U.S.C. § 552(a)(4)(A)(iii). Memorandum Opinion at 86-89. HHS does not appeal the fee waiver determination.

[3] HHS also appeals the district court's determination that the Middle District of Florida's permanent injunction does not bar disclosure of the requested data from physicians who are AMA members. *See Fla. Med. Ass'n*, 479 F. Supp. 1291. It argues that under *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980), a requesting party may not obtain documents under FOIA "when the agency with possession of the documents has been enjoined from disclosing them by a Federal District Court." 445 U.S. at 384. As we resolve this appeal on other grounds, we express no opinion as to the merits of the argument under *GTE Sylvania*.

determine whether "disclosure would compromise a substantial, as opposed to a de minimis, privacy interest." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If a substantial privacy interest is at stake, then we must balance the privacy interest in non-disclosure against the public interest. *Id.* (citing *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984)). Disclosure is not required if it "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The agency bears the burden to persuade the court that the exemption applies. *Ripskis*, 746 F.2d at 3.

A.

We have consistently held that an individual has a substantial privacy interest under FOIA in his financial information, including income. In *Multi AG Media v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), we found that the disclosure of information on "irrigation practices, farm acreage, and the number and width of rows of tobacco and cotton" implicated substantial privacy interests because it would "in some cases allow for an inference to be drawn about the financial situation of an individual farmer" receiving federal subsidies. 515 F.3d at 1226, 1230. In *Painting and Drywall Work Preservation Fund, Inc. v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991), we found that contractors on federal construction projects had a substantial privacy interest in their names, addresses, hourly pay, hours worked and wages. 936 F.2d at 1301-02; *see also Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 995, 998 (10th Cir. 1995) (government contractors on federal construction projects have substantial privacy interest in payroll records); *Painting Indus. of Haw. Market Recovery Fund v. U.S.*

Dep't of Air Force, 26 F.3d 1479, 1484 (9th Cir. 1994) (same); *Hopkins v. HUD*, 929 F.2d 81, 86-87 (2d Cir. 1991) (same). The Congress has also recognized the privacy interest an individual taxpayer has in his tax return information, including the "nature, source, or amount of his income," 26 U.S.C. § 6103(b)(2)(A), and has prohibited the disclosure of tax return information with limited exceptions. *Id.* § 6103(a).

The information requested by CSS would reveal the total Medicare payments received by a physician for covered services. CSS notes that the information would not reveal a physician's gross revenue because it would not include income from non-Medicare sources. Nor would it reveal a physician's net income because it would not include business operating expenses. But the requested information need not reveal completely an individual's personal finances to implicate substantial privacy concerns. *See Multi AG Media*, 515 F.3d at 1228-29 (substantial privacy interests implicated because requested information "would necessarily reveal at least a portion of the owner's personal finances") (quoting *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 (D.C. Cir. 1976)). CSS also argues that a physician does not have a privacy interest in Medicare payments because the payments relate to business activities and not personal finances. We have, however, recognized substantial privacy interests in business-related financial information for individually owned or closely held businesses because the "financial makeup of the businesses mirrors the financial situation of the individual family members." *Multi AG Media*, 515 F.3d at 1229 (internal quotations omitted); *cf. Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (information related to employees' business decisions in developing and marketing medica-

tion does not implicate privacy interests under FOIA Exemption 7); *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261-62 (D.C. Cir. 1982) (no substantial privacy interest in list of organizations in which scientific consultants have financial holdings related to their consulting duties, but not dollar amounts of holdings). Accordingly, we conclude that physicians have a substantial privacy interest in the total payments they receive from Medicare for covered services.

B.

We next examine the public interest in disclosure. The only relevant public interest in disclosure "is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government.*'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989)). The requested information must "shed[ ] light on an agency's performance of its statutory duties." *Reporters Comm. for Freedom of Press*, 489 U.S. at 773. "[I]nformation about private citizens ... that reveals little or nothing about an agency's own conduct" does not serve a relevant public interest under FOIA. *Id.* The requesting party's intended use for the information is irrelevant to our analysis. *See id.* at 771 ("[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request.").

CSS claims that disclosure of the requested records will serve the public interest by revealing information about "(i) HHS's performance in maintaining and enhancing the quality and efficiency of services provided under the Medicare program, (ii) the agency's ability to root out Medicare fraud and waste; and (iii) the

agency's compliance with various transparency initiatives." Appellee's Br. 21. We examine each contention in turn.

1.

The Congress has charged HHS with "promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which payment may be made" by contracting with peer review organizations.[4] 42 U.S.C. § 1395y(g). In 2003, the Congress directed HHS to establish a demonstration program to " examine health delivery factors that encourage the delivery of improved quality in patient care." *Id.* § 1395cc-3(b). While CMS has certain responsibilities to promote quality healthcare for Medicare beneficiaries, it is not authorized to "exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services." *Id.* § 1395.

CMS is also responsible for enrolling health care providers and suppliers, including physicians, in the Medicare program. A "provider" or "supplier" must be enrolled in the Medicare program to receive payment for covered services. 42 C.F.R. §§ 424.505, 424.510. The term "supplier" refers to "a physician or other practitioner, or an entity other than a provider, that-

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[4] Quality peer review organizations review whether services are reasonable and medically necessary, the quality of services and whether certain services can be performed more effectively and economically on an outpatient basis. 42 U.S.C. § 1320c-3(a)(1).

furnishes health care services under Medicare." *Id.* § 400.202. The term "physician" includes "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action." 42 U.S.C. § 1395x(r). CMS may exclude from participation in any Federal health care program, including Medicare, "[a]ny individual or entity ... whose license to provide health care has been revoked or suspended by any State licensing authority ... for reasons bearing on the individual's or entity's professional competence [or] professional performance." *Id.* § 1320a-7(b)(4). CMS may also exclude an individual or entity that "has furnished or caused to be furnished items or services to patients ... substantially in excess of the needs of such patients or of a quality which fails to meet professionally recognized standards of health care." *Id.* § 1320a-7(b)(6)(B).

CSS makes three arguments regarding how the requested data will shed light on HHS's performance of its mission to promote quality healthcare for Medicare beneficiaries. First, it claims that the requested data will indicate the quality of care Medicare patients are receiving. The claim rests on the assumption that the frequency with which a physician performs a medical procedure indicates the quality of the procedure. The medical community has not reached a consensus on whether the number of procedures performed by a physician correlates to the quality of those procedures. *Compare* John D. Birkmeyer et al., *Surgeon Volume and Operative Mortality in the United States*, 349 New Eng. J. Med. 2117, 2117 (2003) ("Patients can often improve their chances of survival substantially, even at high-volume hospitals, by selecting surgeons who perform the operations frequently."), *with* Ethan A. Halm et al., *Is Volume Related to Outcome in Health Care? A*

Systematic Review and Methodologic Critique of the Literature, 137 Annals Internal Med. 511, 517 (2002) ("Twenty years of research have established that, for some procedures and conditions, higher volume among hospitals and physicians is associated with better outcomes. However, the magnitude of the relationship varies greatly among individual procedures and conditions.... Even when a significant association exists, volume does not predict outcome well for individual hospitals or physicians."). Even assuming a strong correlation between volume and quality, the data CSS requests will not indicate total volume because it does not include procedures performed by physicians for non-Medicare patients.

Second, CSS claims that the requested data will enable the public to determine if Medicare is paying physicians with insufficient certifications, disciplinary histories or poor evaluations for a large quantity, or any number, of procedures. The public can determine through publicly available information whether physicians with insufficient certifications, disciplinary histories or poor evaluations are enrolled in the Medicare program. *See U.S. Dep't of Def. Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992) (recognizing that "alternative sources of information available that could serve the public interest in disclosure" diminish public interest value of disclosure). One can infer without the requested data that an enrolled physician is performing at least some procedures. *See* 42 C.F.R. § 424.540(a)(1) (CMS may deactivate physician's Medicare billing privileges if no claims submitted for 12 consecutive months). Currently available information does not enable an individual to know whether a physician with an insufficient certification is performing a large number of (or any) specific procedure, but this

added knowledge does not shed any additional light on whether CMS is following its enrollment procedures contained in 42 C.F.R. § 424.510. *Cf. Multi AG Media*, 515 F.3d at 1231 (requested data indicated entity's eligibility *vel non* to participate in federal benefits program).

Third, CSS claims the "requested records can also be analyzed in conjunction with other treatment records to determine whether individual Medicare doctors are providing all services required to reach standards of recommended care." Appellee's Br. 24. CSS does not explain how the requested data can be used to perform this analysis. Rather, it cites articles noting that the quality of care delivered to Medicare beneficiaries has room for improvement and greater access to information is necessary for improvement. *See* Stephen F. Jencks et al., *Change in the Quality of Care Delivered to Medicare Beneficiaries*, 1998-1999 to 2000-2001, 289 JAMA 305, 305 (2003); Elizabeth A. McGlynn et al., *The Quality of Health Care Delivered to Adults in the United States*, 348 New Eng. J. Med. 2635, 2643-44 (2003).

Even if the requested data could be used to measure the quality of care provided by Medicare-enrolled physicians, it would not shed light on the "agency's performance of its statutory duties." *Reporters Comm. for Freedom of Press*, 489 U.S. at 773. CSS argues that the requested data will indicate the quality of care being provided by Medicare-enrolled physicians and thereby permit the public to assess how well CMS is fulfilling its statutory duty to promote quality. But we fail to see how the requested data will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake. The data will not reveal how well the peer re-

view organizations with which HHS contracts to promote quality healthcare are performing their duties, *see* 42 U.S.C. § 1395y(g), or how well the demonstration program "examine[d] health delivery factors that encourage the delivery of improved quality in patient care." *Id.* § 1395cc-3(b). The data will not assist the public in determining whether Medicare is enrolling physicians who do not meet the enrollment requirements. Nor will it enable the public to determine whether CMS is properly excluding physicians who "fail[ ] to meet professionally recognized standards of health care," *id.* § 1320a7(b)(6)(B), because nothing indicates that a physician who performs a procedure less often fails to meet recognized standards of health care.

2.

CSS next contends that disclosure of the requested data will serve the public interest by revealing fraudulent Medicare claims made by physicians. For example, CSS notes that physicians who submit claims for procedures outside their specialties or who submit unusually high numbers of claims in general or for specific procedures may be committing fraud. But CSS has not provided any evidence of alleged fraud the requested data would reveal. In *United States Department of State v. Ray*, 502 U.S. 164 (1991), the Supreme Court rejected the respondents' "asserted [public] interest [under FOIA Exemption 6] in ascertaining the veracity of the interview reports" prepared by the State Department based on interviews with Haitian nationals involuntarily returned to Haiti. 502 U.S. at 179. The respondents had not presented "a scintilla of evidence ... that tends to impugn the integrity of the reports." *Id.* The Court noted: "If a totally unsupported suggestion that the interest in finding out whether Govern-

ment agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Id.* Similarly, if an unsupported suggestion that an agency may be distributing federal funds to a fraudulent claimant justifies disclosure of private information, the agency would have no defense against FOIA requests for release of private information.

CSS points to a Government Accountability Office (GAO) report as general evidence that Medicare is especially susceptible to fraud. In 1990, the GAO "designated the Medicare program as high risk for fraud, waste, abuse, and mismanagement, in part because of its sheer size and complexity." U.S. GAO, GAO 06-813, Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised 1 (2006), http://www.gao.gov/new.items/d06813.pdf. In 1997, the Congress established the Medicare Integrity Program, under which CMS contracts with eligible entities to safeguard Medicare payments, including investigating potential fraud cases. *Id.* at 1, 11-12; 42 U.S.C. § 1395ddd(a), (b)(1). Without more, the GAO's report does not raise a cognizable public interest under FOIA in verifying that CMS is adequately detecting fraud.[5] In *Multi AG Me-*

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[5] In *Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897 (D.C. Cir. 1996), we found that no public interest would be served by disclosure under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), because the requesting party had offered no evidence that the agency was engaged in illegal activity. 72 F.3d at 905. Similarly, in *McCutchen v. United States Department of Health and Human Services*, 30 F.3d 183, 188 (D.C. Cir. 1994), we found no public interest because the "mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest suf-

dia, we did find that release of the requested data would serve the public interest by allowing the public to "more easily determine whether [the United States Department of Agriculture] is catching cheaters and lawfully administering its subsidy and benefit programs." 515 F.3d at 1232. The specific public interest in *Multi AG Media*, however, was enabling the public "to look at the information the agency had before it when [determining whether a particular farm is eligible to participate in the benefit programs in the first place] so that the public can monitor whether the agency is correctly doing its job." *Id.* at 1231. In contrast, the Medicare claims data is irrelevant to whether physicians meet the Medicare enrollment requirements.

3.

Finally, CSS argues that the requested data will shed light on whether HHS is complying with its own transparency initiatives. HHS recently proposed a new system of records "to assist in projects that provide transparency in health care on a broad-scale enabling consumers to compare the quality and price of health care services so that they can make informed choices among individual physicians, practitioners and providers of services." Privacy Act of 1974; Report of New

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ficient to override the privacy interests protected by Exemption 7(C)." We recognize that the balancing standard for disclosure is different under FOIA Exemption 7(C). *See* 5 U.S.C. § 552(b)(7)(C) (law enforcement records exempt from disclosure if release "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy") (emphasis added). But the rationale of *Computer Professionals* and *McCutchen* for requiring more than unsupported allegations that an agency is not doing its job applies under FOIA Exemption 6 as well.

System of Records, 72 Fed. Reg. 52,133, 52,133 (Sept. 12, 2007). Since 2001, HHS and CMS have launched quality initiatives "to assure quality health care for all Americans through accountability and public disclosure," including publicly reporting certain quality measures to aid consumer decision-making. CMS, Quality Initiatives-General Information-Overview, http://www.cms.hhs.gov/QualityInitiativesGenInfo/ (last visited Jan. 23, 2009).

Contrary to CSS's assertion, the requested data will not assist the public in determining whether CMS is complying with its transparency initiatives to provide consumers with more information about service providers. First, the public is already familiar with the type of data contained in the Medicare claims database, which includes the diagnosis, the type and place of service and the physician's UPIN, as evidenced by CSS's FOIA request. The public does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives. Nor does the public need the data to evaluate whether the steps already taken by CMS are in fact assisting consumers in making informed decisions. Second, according to CSS's logic, CMS must disclose any information possibly relevant to consumer health care decision making, regardless of privacy interests, simply because CMS stated its intention to provide more information relevant to consumer health care decisions. CMS has undertaken certain transparency initiatives but at no point has it pledged, or been directed by the Congress, to disclose any information to the public that could possibly assist consumers in health care decisions without regard to any countervailing interest, including the FOIA-recognized privacy interest. *See* HHS, Value-Driven Health Care Home: Transparency Leads

to Change, http://www.hhs.gov/valuedriven/ (last visited Jan. 23, 2009) ("Transparency is a broad-scale initiative enabling consumers to compare the quality and price of health care services, so they can make informed choices among doctors and hospitals. In cooperation with America's largest employers and the medical profession, this initiative is laying the foundation for pooling and analyzing information about procedures, hospitals and physician services. When this data foundation is in place, regional health information alliances will turn the raw data into useful information for consumers."). CSS in fact seeks to use FOIA to compel CMS to comply with its transparency initiatives as CSS views them, not to evaluate whether CMS is fulfilling its duties.[6]

In sum, the requested data does not serve any FOIA-related public interest in disclosure. Accordingly, we need not balance the non-existent public interest against every physician's substantial privacy interest in the Medicare payments he receives. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("We have been shown no public interest in ... disclosure.... We need not linger over

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[6] CSS would have us place the public in a position akin to a judge conducting *in camera* review of documents to determine whether a party must produce information it deems irrelevant. *See, e.g., Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 236 n.8 (1979) (Stevens, J., dissenting) ("[P]etitioners could have requested that the District Judge view the transcripts *in camera* to test their relevance."). The problem in the FOIA context is that once the Medicare data was viewed by the public and the public had decided its "relevance" under CSS's transparency initiatives, the public would have compelled the very action it wished to evaluate and the issue would be moot.

the balance; something, even a modest privacy interest, outweighs nothing every time."). Accordingly, disclosure of the requested data "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). And even were we to find a FOIA-related public interest in disclosure, it would be negligible at best and insufficient to outweigh the significant privacy interest in non-disclosure. *See Painting and Drywall Work Preserv. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) ("attenuated public interest in disclosure does not outweigh the construction workers' significant privacy interest in the requested information").

For the foregoing reasons, we conclude that the requested Medicare claims data CSS seeks is exempt from disclosure under FOIA Exemption 6, 5 U.S.C. § 552(b)(6). Accordingly, the judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

So ordered.

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: In holding that Exemption 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(6), is dispositive, Op. at 1056, the court has assessed a strong privacy interest for private physicians who receive Medicare reimbursements while ignoring the commanding public interest in disclosure of information that would enhance the public's ability to evaluate how well the Department of Health and Human Services ("HHS") is performing its statutory duties under the Medicare program. As subjective evaluations should not affect the balancing of these interests, it is significant that two district courts here, now and in 1979, and HHS itself have reached a different conclu-

sion about the importance of disclosing such data to the public.

The district court concluded that the data requested by the Consumers' Checkbook, Center for the Study of Services ("the Center") would enhance the public's ability to understand whether HHS is effectively policing reimbursements and physician practices. *Consumers' Checkbook, Ctr. for the Study of Servs. v. Dep't of Health & Human Servs.*, 502 F. Supp. 2d 79, 85-86 (D.D.C. 2007) ("Consumers' Checkbook I"). Another district court judge in this district reached much the same conclusion in 1979. *Pub. Citizen Health Research Group v. Dep't of Health, Educ. & Welfare*, 477 F. Supp. 595, 604 (D.D.C. 1979) ("Public Citizen"), *rev'd on other grounds*, 668 F.2d 537 (D.C. Cir. 1981). HHS, in turn, has previously released such data to at least one private enterprise unrelated to the agency's own initiatives, *see Alley v. Dep't of Health & Human Servs.*, No. CV-07-BE-0096-E, slip op. at 3 (N.D. Ala. May 8, 2008) ("*Alley*, N.D. Ala. 2008"), and also announced as recently as 2007 that it would release much of the requested data to research entities outside of the federal government as part of a program of transparency, Privacy Act of 1974; Report of New System of Records, 72 Fed. Reg. 52,133 (Sep. 12, 2007) ("2007 Records System"). HHS also has not appealed the waiver of FOIA fees for the Center premised on the determination that the requested data is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," 5 U.S.C. § 552(a)(4)(A)(iii). Perhaps this is because, as Judge Gerhard Gesell wrote in 1979, "[p]ractitioners who contract with the government to provide medical services in exchange for federal payments perform a quasi-public function," and given

"Congress' abiding concern to deliver cost-efficient public health care and physicians' clear prerogative to avoid government business," important public interests are at stake. *Public Citizen*, 477 F. Supp. at 604.

I.

The Freedom of Information Act requires agencies to disclose all requested agency records, 5 U.S.C. § 552(a), unless a statutory exemption applies, *id.* § 552(b). It is designed to " 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.' " *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). Consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act," the statutory exemptions are "narrowly construed." *Id.* at 361. Under Exemption 6 an agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). If a court determines that a substantial privacy interest is at stake, the court must then consider whether the "public interest in disclosure outweighs the individual privacy concerns." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002). FOIA's "strong presumption in favor of disclosure places the burden on the agency" to justify nondisclosure. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). This "presumption favoring disclosure ... is at its zenith under Exemption 6." *Nat'l Ass'n of Home Builders*, 309 F.3d at 37.

In March 2006, the Center requested HHS to release certain Medicare claims data for health care providers in the District of Columbia and the States of Illinois, Maryland, Washington, and Virginia. This data

includes the providers' Medicare identification number, procedure codes, diagnosis codes, and geographic codes, but not patient identities. Although this data does not directly reveal annual Medicare reimbursement amounts for particular Medicare providers, the district court found that the information can be used, in conjunction with free, public information that Congress requires HHS to disseminate to the public, *see* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4164, *as amended*, ("OBRA 1990"), 42 U.S.C. § 1395u note, and a free website for which HHS contracts, to determine those amounts. *See Consumers' Checkbook I*, 502 F. Supp. 2d at 84-85; Appellant's Br. at 18.

The crux of the court's determination today that physicians' privacy interests outweigh the public interest in disclosure is its conclusion that the requested data cannot assist the public in assessing either the quality of Medicare services or HHS's efforts to combat fraud and waste. Op. at 1055-56. In reaching this conclusion the court overstates the inviolability of the privacy interest and overlooks the near undeniable fact that the requested data can be of some assistance to the public's evaluation of how HHS is carrying out its initiatives aimed at measuring and improving health care quality and its efforts to combat Medicare fraud and waste.

A.

There is little doubt that the disclosure of the requested material would implicate more than a *de minimus* privacy interest. Privacy encompasses "the individual's control of information concerning his or her person," *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) ("*Reporters Comm.*"), and extends to protect an individual's name

and address, *see Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989); *Fed. Labor Relations Auth. v. Dep't of the Treasury*, 884 F.2d 1446, 1453 (D.C. Cir. 1989), as well as information that would "in some cases allow for an inference to be drawn about the financial situation of an individual," even where the data reveals only a portion of an individual's financial situation, *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008); *see also Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685-86 (D.C. Cir. 1976). Indeed, "[w]hen there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the chain." *Nat'l Ass'n of Retired Fed. Employees*, 879 F.2d at 878. HHS suggests that Medicare reimbursements represent, on average, a quarter of a physician's income, and can account for a "large percentage" of total income for some physicians. Reply Br. at 16.

Nevertheless, as the Center points out, the physicians' privacy interest is "particularly limited," Appellee's Br. at 14-15, because the requested data pertains to receipt of government funds and would not reveal physicians' take-home earnings. Although the fact of federal government funding may not be dispositive in assessing the privacy interest, *see Multi AG Media*, 515 F.3d at 1230; *Nat'l Ass'n of Retired Fed. Employees*, 879 F.2d at 876; *Painting and Drywall Work Pres. Fund v. Dep't of Housing & Urban Dev.*, 936 F.2d 1300, 1302-03 (D.C. Cir. 1991), it cannot be denied that there is an element of public service involved when physicians participate in the Medicare program. *See Public Citizen*, 477 F. Supp. at 604. Further, because the requested data does not directly reveal total income and

because HHS has not shown that one can predictably determine total income using the Medicare reimbursement amounts, "the privacy interest that may exist is [not] particularly strong," *Multi AG Media*, 515 F.3d at 1230; *see also Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971); *Public Citizen*, 477 F. Supp. at 603-04. The extent of that privacy interest varies according to how much of the physician's income is derived from Medicare; a doctor whose patients are mostly Medicare beneficiaries has a greater privacy interest in her Medicare reimbursement amounts than a doctor who treats only a few Medicare patients. Additionally, Congress has already required HHS to publish some private information about Medicare-participating physicians, *see, e.g.*, OBRA 1990, 42 U.S.C. § 1395u note (requiring release of physicians' identification number, address, and related information and HHS has released data much as the Center seeks, *see, e.g.*, *Alley* (N.D. Ala. 2008). Thus, regardless whether a practitioner has many or only a few Medicare patients, HHS fails to meet its burden to show that the privacy invasion at issue would be overly intrusive.

B.

By contrast, there is a commanding and important public interest in disclosure of the data the Center seeks. The single relevant public interest in FOIA balancing is the "extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.' " *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773) (alteration in *Reporters Comm.*). The public interest inquiry focuses, not on the absolute value, but on "the *incre-*

mental value of the specific information being withheld." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added).[1] Because Medicare "distributes extensive amounts of public funds," there is a "special need" for public oversight of HHS's activities in administering Medicare. *Multi AG Media*, 515 F.3d at 1232; *see generally* Government Accountability Office, *Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised*, GAO-06-813 (Sep. 2006). As this court observed in *Multi AG Media*, "Congress has recognized the importance of ensuring the responsible use" of Medicare funds, 515 F.3d at 1232; *see, e.g.*, Inspector General Act of 1978, Pub. L. No. 95-452, § 2, 92 Stat. 101 (1978). Indeed, HHS itself has acknowledged both that it "shares [the Center's] broad policy goals," Appellant's Br. at 39, in public disclosure, and, in response to the Center's fee waiver request, that it "do[es] not dispute that the requested records pertains to operations or activities of the Federal Government and that the disclosure of the records *would* reveal *meaningful information* about government operations or activities," Letter from Herb B. Kuhn, Acting Deputy Adm'r, Dep't of Health & Human Servs., to Robert Krughoff, President, Consumer's

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[1] Although in *Schrecker* the court was addressing FOIA Exemption 7(C) when it emphasized the incremental value of withheld information, only the privacy considerations distinguish Exemptions 6 and 7(C), *see Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 164-66 (2004); the public interest inquiry is the same for both, *see Fed. Labor Relations Auth.*, 510 U.S. at 496 n.6. Because the "incremental value" of withheld information is an appropriate public-interest measure under Exemption 7(C), which "is more protective of privacy than Exemption 6," *see id.*, it is no less of an appropriate measure under Exemption 6.

Checkbook, Ctr. for the Study of Servs. 2 (Mar. 16, 2007) ("Kuhn letter of Mar. 16, 2007") (emphasis added).

There should be little dispute that the requested data would shed light on at least two types of HHS activities.[2] First, the data would enable members of the public to evaluate HHS's performance of its statutory duties regarding the quality of Medicare-provided services. Even if HHS does not have statutory authorization to supervise or control the practice of medicine, see 42 U.S.C. § 1395, Op. at 1052, HHS has a statutory and regulatory duty to evaluate and work to improve the quality, cost, and efficiency of services delivered by Medicare providers. For instance, 42 U.S.C. § 1395y(g) requires HHS to enter into contracts with "utilization and quality control peer review organizations" in order to promote improved delivery and quality of health services. *See* 42 U.S.C. § 1320c *et seq.* (elaborating upon

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[2] During oral argument, the Center discussed 42 U.S.C. § 1395y(a)(1)(B), which precludes reimbursement for services that "are not reasonable and necessary for the prevention of illness." The Center contends persuasively that the requested data, which includes both the diagnosis and the procedure performed, could shed light on whether HHS is paying providers for services in violation of this prohibition. Additionally, the Center mentioned 42 U.S.C. § 1320a-7(b), which provides that the Secretary of HHS has discretion to exclude providers from participating in federal health care programs for various reasons. One such reason is "claims for excessive charges or unnecessary services." 42 U.S.C. § 1320a-7(b)(6). The Center contends that the requested data will shed light on the Secretary's exercise of discretion because an expert looking at diagnosis information and procedure information could probably determine in some cases whether certain procedures, and by implication any charges for those procedures, were excessive or unnecessary. However, I do not rely on § 1320a-7(b)(6) as it was not cited in the Center's brief, thus denying HHS an opportunity to respond in its reply brief.

section 1395y(g)). Likewise, Congress has required HHS to "establish a 5-year demonstration program" for projects examining "health delivery factors that encourage the delivery of improved quality in patient care." *Id.* § 1395cc-3(b). Similarly, HHS's 2007 Records System is designed "to assist in projects that provide transparency in health care on a broad-scale enabling consumers to compare the quality and price of health care so that they can make informed choices among individual physicians, practitioners and providers of services." 72 Fed. Reg. at 52,133. Likewise, in 2006 President Bush signed Executive Order No. 13,410, requiring HHS to "implement programs measuring the quality of services supplied by health care providers to the beneficiaries or enrollees" of Medicare. *See* 71 Fed. Reg. 51,089, 51,090 (Aug. 22, 2006).

Studies show that releasing the data the Center seeks would enable members of the public to evaluate HHS's effectiveness in fulfilling its duties. One study utilized Medicare claims data in determining that the number of procedures performed by a surgeon was inversely related to patient mortality rates for each of eight studied procedures. *See* John D. Birkmeyer et al., *Surgeon Volume and Operative Mortality in the United States*, 349 NEW ENG. J. MED. 2117, 2122-23 (2003). Other studies indicate that information about the number of times a physician has performed a particular procedure would shed at least some light on that physician's success rate. *See, e.g.*, Jim C. Hu et al., *Role of Surgeon Volume In Radical Prostatectomy Outcomes*, 21 J. CLINICAL ONCOLOGY 401 (2003); Deborah Schrag et al., *Hospital and Surgeon Procedure Volume as Predictors of Outcome Following Rectal Cancer Resection*, 236 ANNALS OF SURGERY 583 (2002). That there may not be unanimity within the medical profes-

sion about the closeness of the correlation between experience and quality does not diminish the public interest in disclosure, as the court implies, *see* Op. at 9 (citing Ethan A. Halm et al., *Is Volume Related to Outcome in Health Care? A Systematic Review and Methodologic Critique of the Literature*, 137 ANNALS OF INTERNAL MED. 511 (2002)). Neither HHS nor intervenor the American Medical Association ("AMA") suggests there is no correlation between experience and quality. Even assuming the link between quality and the number of procedures a provider has performed is weak, and even though the requested data will only partially reveal physicians' experience levels, the data has "incremental value" for ascertaining the quality of services performed both at the provider level and program-wide. *See Schrecker*, 349 F.3d at 661.

The requested data also could be used to evaluate the disciplinary and board certification histories of Medicare providers and to study whether Medicare providers meet recommended standards of care for patients with different diagnoses. The data has value over and above currently available information because the public could use it to evaluate the extent of particular physicians' Medicare participation and to determine whether physicians have qualifications to provide the services for which they seek federal reimbursement; currently available information reveals only whether a physician participates in Medicare. Such independent assessments of the quality of Medicare-funded services, analyzed in the aggregate, would serve as a check on HHS's own quality-measuring projects, helping the public ascertain possible weaknesses in the Medicare program itself and in HHS's statutorily-required assessments of the program.

Because "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper," *Washington Post Co.*, 690 F.2d at 264, the existence of internal HHS quality-measuring programs does not diminish the public interest in disclosure. The Supreme Court recognized in *Reporters Committee* that "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny." 489 U.S. at 773. In *National Association of Home Builders*, this court held even though the agency had released its method for designating owl habitats, there was still a public interest in disclosure of the data used in that determination. 309 F.3d at 363. Similarly, in *Multi AG Media*, this court observed that the data at issue "sa[id] everything about whether a particular farm is eligible to participate in the [federal] benefit programs in the first place and thus 'shed[ ] light on the agency's performance of its statutory duties.'" 515 F.3d at 1231 (quoting *Reporters Comm.*, 489 U.S. at 773). The Center has requested several of the same data elements (including provider identification number, diagnosis information, and surgical procedures performed) that HHS has announced it plans to use in the 2007 Records System as part of its oversight and transparency initiatives. *See* 72 Fed. Reg. at 52,135. Thus, even assuming HHS does not use the requested data in determining eligibility or deciding whether to pay a claim, the public has an interest in disclosure of the requested data elements. And even if the data would not specifically shed light on a particular HHS initiative, *see* Op. at 1053-54, the public interest in the data is strong with respect to HHS's fulfillment of the goal underlying many of its statutory and regulatory activities: improving the quality of health care provided under Medicare.

HHS suggests that disclosure of physician-identifying information (specifically, unique physician identification numbers), even if the requested data could shed light on the performance of HHS's statutory duties, would not contribute any additional public benefit and so any data release should redact physicians' names. To the contrary, physician-identifying information would enable the public to analyze the information in context. For example, using the data along with the physician's name, researchers would be able to ascertain whether a physician's low Medicare procedure volume is explained by the number of younger patients being treated. Also, withholding identifying information would compromise the public interest in connection with HHS's reaffirmation of its goal of "enabling consumers to compare the quality and price of health care services so that they can make informed choices among individual physicians, practitioners and providers of services." 72 Fed. Reg. at 52,133. As HHS's stated policy is to facilitate consumer choices about which providers to patronize, it cannot credibly maintain that providing physician-identifying information could not shed light on its own activities. Moreover, because the data the Center seeks cannot be retrieved in any other way, the public interest in disclosure is not significantly diminished by the derivative nature of its proposed use.[3]

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[3] Although HHS suggests that courts have been disinclined to require disclosure in instances of derivative use, neither the Supreme Court nor this court has adopted a *per se* rule against derivative uses. *See Dep't of State v. Ray*, 502 U.S. 164, 179 (1991); *Painting and Drywall Work Pres. Fund v. Dep't of Housing & Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir. 1991). Indeed, in *Getman*, this court indicated that use of data in further studies may

Second, the requested data would shed light on HHS's fraud-detection and fraud-prevention efforts. For instance, the data could identify providers who perform "a suspiciously large number of procedures in a given time period" or "submit[ ] claims for procedures that are outside [their] own practice areas." Appellee's Br. at 29. The data could therefore facilitate public monitoring of HHS detection and prevention of fraud. Additionally, to the extent that consumer choice could be enhanced by knowing which physicians are potentially responsible for wasteful or even fraudulent claims, release of physician-identifying data is consistent with HHS's goal of improving consumers' decisions about which medical providers to patronize. *See* 72 Fed. Reg. at 52,133. The public could utilize the requested information in determining whether HHS is fulfilling this stated goal.

Again, that there may already be, as HHS and the AMA assert, significant government oversight of physicians that the public can oversee does not diminish the public interest in disclosure of the requested data. For instance, the public can currently use a public database to determine whether Medicare is reimbursing

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implicate the relevant public interest, and ordered release of the names and addresses of employees for use in a study of labor representation elections. 450 F.2d at 677. In two subsequent derivative use cases, the court concluded that the public interest in disclosure did not outweigh the privacy interests, distinguishing *Getman* on the ground that the information in *Getman* was not otherwise publicly available, whereas the information at issue in those cases could be accessed in other less intrusive ways. *See Painting and Drywall Work Pres. Fund*, 936 F.2d at 1303; *Fed. Labor Relations Auth. v. Dep't of the Treasury*, 884 F.2d 1446, 1452 (1989).

any providers who have already been excluded from Medicare for misconduct. However, FOIA's purpose is "to permit the public to decide *for itself* whether government action is proper." *Washington Post Co.*, 690 F.2d at 264. Consequently, the public's interest in monitoring compliance is not limited to ensuring that once HHS identifies a provider who has engaged in misconduct, HHS does not reimburse that provider for services. Rather, the public also has an interest in monitoring the effectiveness of HHS's identification of providers responsible for misconduct. The court's suggestion that the Center failed to present evidence of alleged fraud that the requested data would reveal creates a heightened disclosure requirement that is without precedent. Op. at 1053-54. Its reliance on *Ray*, 502 U.S. 164, is misplaced; the only issue in that case was whether the redaction of names and identifying information was lawful, *see id.* at 168, and the Supreme Court rejected the asserted public interest in release of names and other identifying information for studying the veracity of the released reports because there was no evidence suggesting that the reports lacked integrity, *id.* at 179. The Center is not asserting a public interest in disclosure of the physicians' identities for purposes of verifying the accuracy of the other requested data elements. Rather, release of the physicians' identities would enable the public to place the released information in context and better assess HHS's fulfillment of it statutory and regulatory goals. As noted by the Center, the Government Accountability Office report, *Medicare Integrity Program, Agency Approach for Allocating Funds Should Be Revised*, GAO 06-813 (Sep. 2006), indicated that HHS had estimated $12.1 billion net of improper payments to Medicare providers in 2005, offering support for the proposition that HHS

makes some Medicare payments to fraudulent claimants.

In sum, Medicare providers' privacy interest in data that would reveal part of their annual income is more than *de minimus* but not particularly strong, especially given previous and planned disclosures by HHS. On the other hand, the requested data would shed light on at least two key HHS responsibilities under Medicare: (1) measuring and improving the quality of health care that is provided and (2) combating and detecting fraud and waste. To the extent that the requested data may shed little light on the quality of health care delivered by physicians with only a few Medicare patients, such physicians also have relatively weak privacy interests in Medicare reimbursement amounts, which likely represent a small portion of their annual income. For physicians treating many Medicare patients, the privacy interest is greater but so is the usefulness of the requested data. HHS has reached the same conclusion as the Center about the meaningfulness of the requested data in informing the public about HHS's Medicare activities, *see, e.g.*, Kuhn letter of Mar. 16, 2007; 2007 Records System, 72 Fed. Reg. at 52,133. HHS, consequently, has not met its burden to show that release of the requested data "would constitute a *clearly unwarranted* invasion of personal privacy," 5 U.S.C. § 552(b)(6) (emphasis added).

III.

Although FOIA Exemption 6 would not bar release of the requested data, HHS contends that release is nonetheless barred by an injunction issued by the United States District Court for the Middle District of

Florida in 1979.[4] If the injunction would bar release of the data that the Center seeks, then HHS would not "improperly" be withholding it and the court would lack jurisdiction to order disclosure. *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980); *see Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). The district court concluded that the 1979 Florida injunction was "immaterial" to its analysis because the Center was seeking " different records." *Consumers' Checkbook I*, 502 F. Supp. 2d at 86 n.1. Although this is true, the Center appears to understate the effect of releasing at least some of the requested data in urging a narrow construction of the in-

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[4] In *Florida Medical Association v. Department of Health, Education and Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979), the district court enjoined HHS's predecessor:

> from disclosing any list of annual Medicare reimbursement amounts, for any years, which would personally and individually identify those providers of services under the Medicare program who are members of the recertified class in this case.

Florida Med. Ass'n v. Dep't of Health, Educ. & Welfare, No. 78-178-Civ-J-S, 1-2 (M.D. Fla. 1979). The recertified class comprised all physicians licensed to practice in Florida and all AMA members who are not Florida physicians but are providers of Medicare services and would be individually identified in a disclosure. *Florida Med. Ass'n*, 479 F. Supp. at 1295-96. A federal court in Louisiana issued a similar injunction in 1980. *See Am. Ass'n of Councils of Med. Staffs of Private Hosps. v. Health Care Fin. Admin.*, No. 78-1373 (E.D. La. May 5, 1980). In 2008, a district court in Alabama ruled that the 1979 Florida injunction applies only to data that indicates "annual Medicare reimbursement amounts" in a manner that would personally and individually identify Medicare providers who are members of the recertified class, or is tantamount to providing such information. *See Alley*, N.D. Ala. 2008.

junction while HHS appears to overstate the scope of the injunction.

The data requested by the Center does not coincide precisely with the data elements that were covered by the list addressed in the Florida injunction. The Center has requested 29 data elements for claims submitted to HHS, including the physician provider's identification number, the patient's diagnosis, the procedures performed, and the time and place of service. It did not request the provider's name, address, or reimbursement amounts, the elements specifically covered by the Florida injunction, *see supra* note 4. However, the district court found that by combining the requested data with publicly available information the public could calculate the reimbursement amounts for particular procedures by individual physicians. *Consumers' Checkbook I*, 502 F. Supp. 2d at 84. The Center has not shown that this finding is clearly erroneous.

The 1979 Florida injunction contains broad language and its purpose to apply broadly is evident from the accompanying declaratory judgment and opinion, *see Haskell v. Kansas Nat. Gas Co.*, 224 U.S. 217, 223 (1912). It "permanently enjoin[s]" disclosure of "any list" of Medicare reimbursement amounts for "any years" that would identify members of the recertified class. *Florida Med. Ass'n v. Dep't of Health, Educ. & Welfare*, No. 78-178-Civ-J-s, 1-2 (M.D. Fla. 1979). The accompanying declaratory judgments states: "Any ... disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would personally and individually identify the providers of services under the Medicare program who are members of the recertified class in this case is declared to be contrary to federal law." *Id.* at 2. The accompanying opinion describes the issue presented as "whether the Secretary ... of [HHS's

predecessor] may disclose information concerning the annual amounts of reimbursements paid to Medicare providers in a way that would individually identify at least some of those providers." *Florida Med. Ass'n*, 479 F. Supp. at 1294. The opinion concludes that the list at issue was a "similar file" under FOIA Exemption 6, observing that "[c]ourts must look past mere appearances and beneath labels, to the actual character and nature of the information in question." *Id.* at 1303. A 1982 modification provided that the injunction did not prohibit disclosure of annual Medicare payment information about individual physicians pursuant to the law enforcement exception under the Privacy Act, 5 U.S.C. § 552a(b)(7). *Florida Med. Ass'n v. Dep't of Health & Human Servs.*, No. 78-178-Civ-J-S (M.D. Fla. Dec. 2, 1982).

In these circumstances, *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 906-07 (7th Cir. 1995), and *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990), on which the Center relies, may not counsel a contrary conclusion about the scope of the 1979 Florida injunction. Although injunctions are to be construed narrowly, "the rule of strict construction of injunctions should not be pressed to a dryly logical extreme," *Schering*, 62 F.3d at 906, and an injunction should be tailored to the harm redressed, *ALPO Petfoods*, 913 F.2d at 972. HHS views the injunction as protecting against invasions of privacy resulting from release of reimbursement amounts for members of the recertified class, presumably relying on this court's FOIA precedent regarding linkage, *e.g.*, *Nat'l Ass'n of Retired Fed. Employees*, 879 F.2d at 878. The Center points out, however, that HHS's 2007 Records System for quality monitoring, designed to advance the public interest in transparency, would entail

releasing to outside researchers the information covered by the 1979 Florida injunction. HHS has responded that such data might not include the reimbursement amounts. *See* Reply Br. at 11. Where this leaves HHS's view of the scope of the 1979 Florida injunction is unclear. In any event, the question remains whether any doubt about the scope of the injunction requires it to be read narrowly. *See In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985).

Furthermore, by its specific terms, the 1979 Florida injunction is limited to the recertified class, as HHS acknowledged during oral argument; it does not reach the release of data concerning other physicians. HHS responds that segregating such data would be an arduous, lengthy task, subject to error. Perhaps so, but HHS has yet to explain satisfactorily why this would be in an age of computerized record keeping. Given FOIA's presumption in favor of disclosure, HHS is obligated to segregate these records, *see* 5 U.S.C. § 552(b), or at least to "provide a more detailed justification than the conclusory statements it has offered to date," *Mead Data Centr., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), as to why segregation would be unreasonable.

Accordingly, I would affirm the district court's ruling that FOIA Exemption 6 does not bar release of the Medicare data that the Center seeks, at least as to records pertaining to physicians who are not members of the recertified class covered by the 1979 Florida injunction and perhaps with regard to others as well, and I would remand the case to the district court for further proceedings on the scope of the injunction, including an opportunity for HHS to explain why an order requiring segregation of the data would be unreasonable.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-2201 (EGS)

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,
Defendants.

Appeal from the United States District Court
for the District of Columbia (No. 06cv02201)

MEMORANDUM OPINION

Plaintiff, Consumer's Checkbook/Center for the Study of Services ("CSS") brings this case to require the federal government defendants to disclose documents responsive to plaintiff's Freedom of Information Act ("FOIA") request and to prevent defendants from assessing fees for fulfilling this request. Pending before the Court are the parties' cross-motions for summary judgment. Upon consideration of the motions and supporting memoranda, the responses and replies thereto, the applicable law, and the entire record, the Court determines that plaintiff is entitled to production of the requested documents in full as well as a fee waiver. Therefore, for the reasons stated herein, plain-

tiff's motion for summary judgment is **GRANTED**, and defendants' motion for summary judgment is **DENIED**.

BACKGROUND

On March 27, 2006, plaintiff sent to defendant Centers for Medicare and Medicaid Services ("CMS"), which is part of the Department of Health and Human Services ("HHS"), a request for information under FOIA. Plaintiff sought disclosure of a specified subset of records for Medicare claims from a database maintained by CMS for each of the five following localities: Washington, D.C., Illinois, Maryland, Washington, and Virginia. The records pertained to all Medicare claims submitted by physicians during 2004. Plaintiff's request for information did not seek any identifying information of Medicare patients.

Also in their March 2006 request, plaintiff sought a fee waiver for the costs associated with fulfilling this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.45. In support of this claim, plaintiff argued that a fee waiver was appropriate because the requested information would contribute to the public's understanding of the operations of CMS and the Medicare program. Plaintiff also argued that its commercial interests were not the primary purpose for the request.

On June 26, 2006, CMS denied plaintiff's FOIA request on the grounds that it could not satisfy the request utilizing a reasonable effort. *See* 5 U.S.C. § 552(a)(3)(B). Because the FOIA request was denied, CMS did not address plaintiff's fee waiver. On July 25, 2006, plaintiff appealed CMS's denial of the FOIA request.

On December 26, 2006, plaintiff filed its complaint with this Court, which asked the Court to direct the

disclosure of the requested documents under FOIA. Subsequently, on January 29, 2007, CMS revised its ruling on plaintiff's original FOIA request and determined that defendants would be able to produce the responsive documents. Also in the January 29 letter, CMS denied plaintiff's request for a fee waiver and provided an estimate of the cost of producing the requested documents: $3,944.70 per locality. CMS recommended that plaintiff narrow the scope of the request and plaintiff complied by temporarily narrowing the scope of the request to relevant data from Washington, D.C. only. On February 28, 2007, plaintiff appealed the denial of its request for a fee waiver.

Based on their actions in January 2007, defendants filed a motion for summary judgment on March 1, which argued that plaintiff had failed to administratively exhaust its FOIA claim because it had not completed its appeal of the fee waiver determination. On March 16, 2007, CMS upheld the denial of plaintiff's fee waiver request on appeal for multiple reasons, including that plaintiff had not sufficiently established that its primary interest in the request was not a commercial one. Fee Waiver Appeal Decision, Pl.'s Ex. 1. In its decision though, CMS stated that it would release in full and without redaction the requested information for Washington, D.C.

On April 4, 2007, plaintiff filed an amended complaint, which asked the Court to direct the disclosure of all the requested documents, reverse the fee waiver determination, and award attorney fees and costs. Subsequently, defendants filed a supplement to their motion for summary judgment in which they changed course again and indicated that they would invoke FOIA Exemption 6 to withhold the physician-identifying information in the records requested by plaintiff. Plaintiff

then filed its cross-motion for summary judgment, arguing that FOIA Exemption 6 is not applicable and that it is entitled to a fee waiver.

STANDARD OF REVIEW

Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Waterhouse v. Dist. of Columbia*, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party opposing the motion has a duty to submit affidavits or other forms of information to the court to "set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Celotex Corp.*, 477 U.S. at 322 (citing Fed. R. Civ. P. 56(e)). "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)).

ANALYSIS

The parties' cross-motions present the Court three issues to resolve: (1) whether plaintiff has exhausted its administrative remedies; (2)the applicability of FOIA Exemption 6 to plaintiff's request; and (3) whether plaintiff's fee waiver request should be granted. The

first issue is easily disposed of now. Defendants' exhaustion argument was based on the fact that plaintiff had not completed the fee waiver appeal process when defendants filed their motion for summary judgment. Since then, the appeals process has been completed and CMS issued a final decision on the fee waiver on March 16, 2007. Therefore, plaintiff has exhausted its administrative remedies. *See Oblesby v. Dep't of Army*, 920 F.2d 57, 66 (D.C. Cir. 1990).

I. FOIA EXEMPTION 6

Under FOIA, an agency may withhold documents responsive to a FOIA request only if the responsive documents fall within one of nine enumerated statutory exemptions. *See* 5 U.S.C. § 552(b); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Consistent with the Act's "goal of broad disclosure, these exemptions have been consistently given a narrow compass," *Tax Analysts*, 492 U.S. at 151, and there is a "strong presumption in favor of disclosure." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency bears the burden of justifying any withholding, and the Court reviews the agency claims of exemption de novo. *See* 5 U.S.C. § 552(a)(4)(B); *see also Ray*, 502 U.S. at 173-74; *Summers v. Dep't of Justice*, 140 F.3d 1077, 1079-80 (D.C. Cir. 1998). To enable the Court to determine whether documents properly were withheld, the agency must provide a detailed description of the information withheld through the submission of a so-called "Vaughn index," sufficiently detailed affidavits or declarations, or both. *See Oglesby v. Dep't of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996); *Bigwood v. U.S. Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 74 (D.D.C. 2007).

Exemption 6 of FOIA permits the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Under this provision, the first question is whether the requested information is contained in personnel, medical, or "similar" files. *See Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("[T]he phrase 'similar files' was to have a broad, rather than a narrow meaning."); *see also Horowitz v. Peace Corps*, 428 F.3d 271, 277 (D.C. Cir. 2005). In this case, the parties do not dispute that the this first requirement is met.

Second, if the information sought is contained in such files, the Court must assess "whether the information is of such a nature that its disclosure would constitute a clearly unwarranted privacy invasion." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citing *Washington Post*, 456 U.S. at 598). "To determine whether release of a file would result in a clearly unwarranted invasion of personal privacy, [the Court] must balance the private interest involved (namely, 'the individual's right of privacy') against the public interest (namely, 'the basic purpose of the Freedom of Information Act,' which is 'to open agency action to the light of public scrutiny')." *Horowitz*, 428 F.3d at 277-78 (quoting and citing *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372-73 (1976)). The Court must balance the individual's interest in privacy against the public interest in disclosure, keeping at the forefront the FOIA's "basic policy of opening agency action to the light of public scrutiny." *Home Builders*, 309 F.3d at 32 (quoting *Ray*, 502 U.S. at 175).

Under Exemption 6, the "only relevant 'public interest in disclosure' to be weighed in this balance is the

extent to which disclosure would serve the 'core purpose of FOIA', which is 'contributing significantly to public understanding of the operations or activities of government.'" *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *see Horowitz*, 428 F.3d at 278. Throughout this analysis, the burden remains on the government to justify any withholdings, since "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere under the Act." *Home Builders*, 309 F.3d at 32; *see also Ripskis v. Dep't of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) ("[T]he 'clearly unwarranted' language of Exemption 6 weights the scales in favor of disclosure.").

Plaintiff requested information regarding 2004 Medicare claims submitted by physicians. Plaintiff did not request identifying information for individual patients, but did request information that would allow plaintiff to identify individual Medicare service providers and determine each time a provider performed a particular service or procedure. Defendants argue that releasing the requested information would also allow plaintiff to combine the information with a publicly available Medicare fee schedule in order to calculate the specific amount that a Medicare provider receives annually in Medicare reimbursements. Defendants argue that this financial information would constitute an unwarranted invasion of the personal privacy of Medicare providers.

The public interest at stake is the interest in obtaining information that would help the public make more informed Medicare decisions and the interest in more information of how government funds are spent. Plaintiff seeks the Medicare records to facilitate useful qualify studies regarding the services provided by

Medicare physicians. Specifically, plaintiff contends that analysis of the requested data will allowed the public to examine, among other things, "(1) whether the government is allowing and paying for Medicare physicians with less-than-optimal levels of experience to perform difficult procedures;" (2) "whether the government is allowing Medicare physicians with insufficient board certifications, histories of disciplinary actions, or poor scores on independent quality assessments to perform high volumes of difficult procedures for which they may not be qualified;" and (3) "whether Medicare physicians are exhibiting practice patterns that conform with existing guidelines (e.g. whether physicians treating patients with specific diagnoses are providing annual exams and screenings recommended for those patients)." In order to perform these types of analyses, the Medicare claim information must include physician-identifying information linked to each Medicare service or procedure.

Generally, courts acknowledge proper application of Exemption 6 where the private interest at stake involves the intimate details of an individual's life. Where courts have ruled that Exemption 6 was properly invoked, the documents sought included an individual's name and address combined with personal financial information that would invite commercial solicitation, *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999), intimate personal information, such as number and legitimacy of children, medical history, welfare benefits received, or alcohol consumption, *Rural Housing Alliance v. U.S. Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974), or information that exposed an individual to physical danger, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006). *See also Horowitz*, 428 F.3d at 280 (applying Exemption 6 to identity of

individual who reported a sexual assault); *Bigwood*, 484 F. Supp. 2d at 77 (applying Exemption 6 to identifying information where it created a risk of physical danger to the individual).

On the other hand, Exemption 6 provides less protection for information that relates to an individual's business affairs. *See, e.g., Washington Post Co. v. Dep't of Health and Human Servs.*, 690 F.2d 252, 261-62 (D.C. Cir. 1982) (holding that disclosure of agency consultants' non-federal employment "would be only a minimal invasion of privacy" and that disclosure of organizations in which consultants have financial interests "does not amount to a serious invasion"); *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships."); *Board of Trade v. CFTC*, 627 F.2d 392, 399-400 (D.C. Cir. 1980) (finding only a "slight privacy interest" implicated by disclosure of "purely commercial matters"). For instance, in *Washington Post Co. v. United States Department of Agriculture*, 943 F. Supp. 31 (D.D.C. 1996) the court held that the disclosure of names and addresses of individuals and the amount of cotton-farming subsidies they received from the government did not constitute an unwarranted invasion of personal privacy because the disclosed information related to the individual's business interests and there was a strong public interest in understanding the administration of the subsidy program. *Id.* at 35-37. Similarly, in *Multi AG Media LLC v. Department of Agriculture*, Civil No. 05-1908, 2006 WL 2320941 (D.D.C. Aug. 9, 2006), the court held that the disclosure of information regarding an individual's financial assets—livestock in this case—did not constitute an unwarranted invasion of personal privacy because the

privacy interest was outweighed by the public interest in understanding the administration of the subsidy program at issue. *Id.* at *4-5.

In line with this consistent interpretation of Exemption 6, the Court concludes that the exemption does not apply in this case. The information plaintiff requests to be disclosed concerns only the business income of the physicians involved and not intimate facts about their personal lives. As in the two Department of Agriculture cases, plaintiff solely seeks information related to payments made by the government in order to better understand the functioning of the government program. *See Washington Post*, 943 F. Supp. at 35-37; *Multi AG Media*, 2006 WL 2320941, at *4-5. Furthermore, the information that the defendants are concerned about releasing—the annual amounts of Medicare reimbursements paid to an individual physician—will not necessarily indicate to the general public the annual salary of each physician. It will merely reflect a portion of the physician's income. There will be no other financial information about the practitioner's business; the data will merely indicate the amount of government funds individual practitioners received. Because plaintiff needs physician-identifying information to conduct its analysis of Medicare services, the minimal privacy interests of physicians in the amount of government funds they receive is outweighed.

Two district court cases from 1979 support the conclusion that Exemption 6 does not apply. In *Florida Medical Association, Inc. v. Department of Health, Education, and Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979), at issue was whether Exemption 6 covered the disclosure of information concerning the annual amounts of reimbursements paid to Medicare providers in a way that would individually identify some of the

providers. *Id.* at 1294. The public interest asserted in favor of disclosure was "knowing the amounts of public funds spent in reimbursing Medicare providers annually, especially in light of the ongoing legislative debate over national health insurance." *Id.* at 1304. The court found, however, that this public concern was not advanced by revealing the identity of individual provides and their reimbursement amounts, and therefore held that the disclosure fell within Exemption 6. *Id.* at 1305.[1]

In contrast to the Florida case, a case from this district presents a situation much closer to the one at bar. In *Public Citizen Health Research Group v. Department of Health, Education, and Welfare*, 477 F. Supp. 595 (D.D.C. 1979), *rev'd on other grounds by* 668 F.2d 537 (D.C. Cir. 1981), at issue was whether Exemption 6 covered the disclosure of physician profiles of certain Medicare providers and several studies of Medicare services. *Id.* at 598-99. The government contended that the privacy interests of the physicians took precedent over the disclosure. The court concluded, though, that the disclosure "that a physician performs a large number of surgical procedures, or has requests for extension in hospital denied regularly, does not possess that 'intimacy' which has protected records" under Exemption 6. *Id.* at 604. The physicians' privacy interests were instead outweighed by "the interest in enabling the consuming public to make more fully informed

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[1] As a remedy, the court entered a permanent injunction apparently barring the proposed disclosure. *See id.* at 1311. Defendants in this case indicate that they are still subject to this injunction. As plaintiff seeks different records, however, the injunction is immaterial to this Court's analysis.

choices among individual physicians and hospitals rendering Medicare and Medicaid services," as well as the interest in assisting physicians making referrals and academics researching health care issues. *Id.* The disclosure in question essentially served to scrutinize government performance, which the court noted is at the core of FOIA. *Id.* Finally, the court noted that the disclosures did not reveal a physician's entire professional dealings, but only information regarding services compensated out of public funds, and concluded that such disclosures of "quasi-public" functions did not implicate significant privacy interests for the physicians. *Id.* Therefore, the court held that the disclosures were not covered by Exemption 6. *Id.* at 605.

The documents sought by plaintiff in this case are of the same nature as those sought in both of these 1979 cases, but the interests that plaintiff asserts more closely match those in the *Public Citizen* case. Plaintiff here is similarly looking for data to assist in the performance evaluation of Medicare providers, and the interests plaintiff seeks to meet require that the data include physician-identifying information. Moreover, the physician data also only involves information related to the physicians' participation in and compensation from a government program, and thus only implicates very limited privacy interests. *See Washington Post*, 943 F. Supp. at 35-37; *Multi AG Media*, 2006 WL 2320941, at *4-5. Therefore, the Court concludes that disclosure of the physician information is not "clearly unwarranted" in light of the important public interests at stake. *See Public Citizen*, 477 F. Supp. at 605.

II. Fee Waiver Determination

FOIA allows for a fee waiver to eligible requesters when the information sought is "in the public interest

because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). HHS has promulgated regulations implementing the standard for granting a fee waiver in a two-part test. To obtain a fee waiver the requester must first prove that the information sought is in the public interest "because it is likely to contribute significantly to public understanding of the operations or activities of the government." 45 C.F.R. § 5.45(a)(1). Second, the requester must prove that the information it seeks is not primarily in its commercial interest. *Id.* § 5.45(a)(2). For each prong of the test, HHS has specified several factors to consider in making the determination. *Id.* § 5.45(b), (c).[2]

A court's review of an agency ruling on a fee waiver request is *de novo*, but is limited to the record that was before the agency. 5 U.S.C. § 552(a)(4)(A)(vii); *Physician's Comm.*, 480 F. Supp. 2d at 121. The burden of proving that a party is eligible for a fee waiver is on the party requesting the waiver. *Physician's Comm.*, 480 F. Supp. 2d at 123. The requesting party must also "assert[] with reasonable specificity" the public interest. *Id.* Finally, "FOIA, as amended in 1986, 'is to be liberally construed in favor of waivers for noncommercial requesters.'" *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Health and Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006)

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[2] The agency's interpretation of FOIA in these regulations has not been questioned by the parties and thus will be utilized by the Court. See *Physician's Comm. for Responsible Med. v. Dep't of Health and Human Servs.*, 480 F. Supp. 2d 119, 122 n.3 (D.D.C. 2007).

(quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

A. Public Interest

According to the HHS regulations, four factors are relevant to the evaluation of the requester's contribution to the public interest:

> (1) How, if at all, do the records to be disclosed pertain to the operations or activities of the Federal Government?
>
> (2) Would disclosure of the records reveal any meaningful information about government operations or activities? Can one learn from these records anything about such operations that is not already public knowledge?
>
> (3) Will the disclosure advance the understanding of the general public as distinguished from a narrow segment of interested persons? . . .
>
> (4) Will the contribution to public understanding be a significant one? Will the public's understanding of the government's operations be substantially greater as a result of the disclosure?

45 C.F.R. § 5.45(b)(1)-(4). With respect to the first two public interest factors, CMS agreed with plaintiff in its appeal decision that "the requested records pertain to operations or activities of the Federal Government and that the disclosure of the records would reveal meaningful information about government operations or activities." Fee Waiver Appeal Decision at 2. Thus, these factors are not issue in this case.

With regard to the third factor, defendants argue that plaintiff failed to adequately demonstrate that disclosure of the requested information would advance the understanding of the general public as compared to a smaller group of individuals. Plaintiff, in the fee waiver

appeal letter to CMS, provided CMS with a detailed description of how it had previously disseminated similar information to the general public, and thus how it expected to disseminate the records requested in this case. Plaintiff's Appeal Letter, Ex. H to Am. Compl., at 3-4. Plaintiff specified that information would be distributed through its magazine, which has approximately 110,000 subscribers. Results of studies would also be distributed through press releases and would be covered by numerous major media outlets. As an example, plaintiff noted that it has an ongoing relationship with one of the local television channels in Washington, D.C. to cover plaintiff's reports on a morning news program. Plaintiff also indicated that some content would be freely available on its website. Finally, plaintiff pointed to an evaluation of hospitals that it produced in 2002 where its findings were publicized and then reported by more than 125 newspapers and TV and radio stations.

Defendants contend that plaintiff's purported plan is inadequate because plaintiff charges for access to some of its information (though its magazine or website) and plaintiff's appeal did not specify how much it would charge consumers for the information in the requested records. Nonetheless, plaintiff's description of its publication methods is sufficient. In *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003), the D.C. Circuit found that the FOIA requester sufficiently described its publication methods by generally describing numerous avenues of publication and detailing past efforts. *Id.* at 1314. Similarly, in *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54 (D.D.C. 2002), the court found it sufficient that the requester had "described several methods it uses to make information available to the public, it has a record of conveying to

the public information obtained through FOIA requests, and it has stated its intent to do so in this case." *Id.* at 62. As plaintiff has done the same here, the Court concludes that the third factor has been met.

With regard to the fourth factor, defendants contend that plaintiff has not demonstrated that the requested disclosure will result in a significant gain in public understanding of the government. Plaintiff, in its fee waiver appeal letter to CMS, stated that the benefit to the public will be significant because the requested records will allow for analysis of Medicare services that is not presently available. For instance, plaintiff pointed to studies showing that for some medical procedures, physicians that perform a high volume of the procedures produce superior quality outcomes for their patients. Plaintiff's Appeal Letter at 4. The requested records will allow plaintiff to analyze this indicator of quality for Medicare providers and publish results.

Defendants contend that the plaintiff's purported public benefit is insignificant because plaintiff's publications could not convey the full amount of data in the records requested. It seems clear, however, that the public would most fully benefit from the requested data if it is analyzed and synthesized by a research organization, such as the plaintiff, and published in a useful form. Defendants also contend that the data sought by plaintiff will not be able to produce "an overall quality analysis." *See* Fee Waiver Appeal Decision at 3. Even if plaintiff though is only able to provide a partial measure of the overall quality of Medicare services, such a contribution would still be a significant public benefit considering the complexity and importance of the Medicare program. Therefore, the Court concludes that plaintiff satisfies the fourth factor. As plaintiff

thus meets all four public interest factors, plaintiff satisfies the public interest prong of the fee waiver test.

B. Commercial Interest

According to the HHS regulations, if the public interest prong is satisfied, the next step is to "determine whether it also furthers the requester's commercial interest and, if so, whether this effect outweighs the advancement of that public interest." 45 C.F.R. § 5.45(c). Two factors are considered in making this determination:

> (1) Would the disclosure further a commercial interest of the requester, or of someone on whose behalf the requester is acting? "Commercial interests" include interests relating to business, trade, and profit. Not only profit-making corporations have commercial interests—so do nonprofit corporations, individuals, unions, and other associations. The interest of a representative of the news media in using the information for news dissemination purposes will not be considered a commercial interest.
>
> (2) If disclosure would further a commercial interest of the requester, would that effect outweigh the advancement of the public interest defined in paragraph (b) of this section? Which effect is primary?

45 C.F.R. § 5.45(c)(1)-(2). Defendants contend that plaintiff has a commercial interest in the disclosure at issue and there is evidence in the record to support that contention. While plaintiff did indicate that information gained from the disclosure would be distributed through means free for consumers, such as by media reports or freely on plaintiff's website, there are also

indications that some means of dissemination may require payments by consumers. It is undisputed that plaintiff has previously charged consumers $19.95 or $24.95 for its special reports, or required them to pay subscription fees for plaintiff's magazine and access to sections of its website. *See* Fee Waiver Appeal Decision at 4. Thus, it appears likely that some information from the requested records will only be available to the public for a fee. Therefore, the disclosure furthers a commercial interest of plaintiff.

Considering the second factor, however, the Court concludes that plaintiff's commercial interest does not outweigh the advancement of the public interest here. It is undisputed that plaintiff is a nonprofit organization. Moreover, plaintiff's operations are "fully funded through subscription and publication sales, fees for survey and information services, and consumer donations" because plaintiff does not accept any advertising. 2007 Press Report attached to Plaintiff's Appeal Letter, Ex. H to Am. Compl., at 11. The D.C. Circuit has held that the "fact that a bona fide scholar profits from his scholarly endeavors is insufficient to render his actions 'primarily ... commercial' for purposes of calculating a fee waiver, as Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 35-36 (D.C. Cir. 1998) (emphasis added). Thus, the fact that plaintiff charges fees in order to produce and distribute its work does not render its interests "primarily commercial." To the contrary, as plaintiff does not operate for profit, and charges fees only in order to support its operations because it does not accept advertising, its primary interest is in distributing useful consumer information to the public.

Therefore, the Court concludes that plaintiff's primary interest in the requested records is not commercial, and thus plaintiff is entitled to a fee waiver. *See* 45 C.F.R. § 5.45(a).

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is **GRANTED** and defendants' motion for summary judgment is **DENIED**. Accordingly, defendants are directed to provide plaintiff a complete production of the records requested by plaintiff for all localities by no later than September 21, 2007, and must waive the fees for plaintiff. An appropriate Order, which includes further instructions, accompanies this Memorandum Opinion.

Signed: **Emmet G. Sullivan**
United States District Judge
August 22, 2007

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2008
No. 07-5343
Filed on: January 30, 2009

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,

Appellee

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES et al.,

Appellants

AMERICAN MEDICAL ASSOCIATION,

Intervenor.

Appeal from the United States District Court
for the District of Columbia
(No. 06cv02201)

JUDGMENT

Before: HENDERSON, RANDOLPH and ROGERS, *Circuit Judges*

This cause came on to be heard on the record on appeal from the United States District Court for the

District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby reversed and the case remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: January 30, 2009

Opinion for the court filed by Circuit Judge Henderson.

Opinion concurring in part and dissenting in part filed by Circuit Judge Rogers.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2008
No. 07-5343
06cv02201
Filed on: June 2, 2009

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,

Appellee

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES et al.,

Appellants

AMERICAN MEDICAL ASSOCIATION,

Intervenor.

ORDER

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers,* Tatel,* Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

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* Circuit Judges Rogers, Tatel, and Garland would grant the petition for rehearing en banc.

Appellee's petition for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX E

[Department of Health & Human Services letterhead]
[STAMP: JUN 26 2006]

Office of Strategic Operations and Regulatory Affairs/Freedom of Information Group

Refer to: C06FOI1318 (KJ)

Robert Krughoff
Center for the Study of Services
1625 K Street, NW, 8th Floor
Washington, DC 20006

Dear Mr. Krughoff:

This is in response to your Freedom of Information request dated March 27, 2006, seeking access to Medicare claims records compiled and maintained electronically by the Centers for Medicare & Medicaid Services (CMS) in the Carrier SAF files (previously known as the Physician/Supplier Part B files). You requested a subset of the data elements from the Carrier SAF files. You limited your request to: data records for Calendar Year 2004; data records generated from physician claims and; data records for which the Line NCH Provider State Code is DC, IL, MD, WA or VA.

We are unable to comply with your request because the agency does not maintain a record that is responsive to your request and because, under FOIA, we are not required either to create records or to furnish information in a particular form or format when a record in such form or format is not readily reproducible employing reasonable efforts. See 5 U.S.C. § 552(a)(3)(B). We

will not reproduce a record in a form or format that would be responsive to your request because we cannot readily do so with reasonable effort.

To explain, the carrier SAF is not the repository of the calendar year 2004 records you have requested. Medicare claims records that cover calendar year 2004 are maintained electronically by CMS in the National Claims History (NCH) files. The NCH is a "flat file database" in which the files are generally read one record per line in sequential order. The NCH contains approximately 829.4 million claims for calendar year 2004. In order to process your request, each of the 829.4 million claims that is identified with the provider state codes of interest to you would need to be reformatted to include only the data elements that you have requested. The computer analysis and generation time associated with this "reformatting" effort is approximately two weeks or longer if a single file is produced. Hence, it is not possible to satisfy your request with reasonable effort.

I wish to point out that on June 1, 2006, CMS announced an effort to make health care more affordable and accessible, by making cost and quality data available. CMS posted the costs it pays hospitals for 30 common elective procedures and other hospital admissions at:

http://www.cms.hhs.gov/HealthCareConInit/

The information is categorized by state and county and includes a range of prices, the national average payment for the procedure, and the number of cases the hospital has handled.

CMS is working closely with a number of national and local organizations to develop more comprehensive and

personalized information for common elective procedures of ambulatory services centers later this summer and common hospital outpatient and physician services this fall.

Additional information on transparency in health care costs and quality is located at:

http://www.hhs.gov/news/press/2006pres/20060601a.html

and,

http://www.cms.hhs.gov/apps/media/press/release.asp?Counter=1872

You may appeal this decision instead of requesting an informal review. To file an appeal, you must appeal in writing within 45 days of the date of this letter. Both your appeal letter and the envelope in which it is sent should be labeled "Freedom of Information Act Appeal." Enclosing a copy of this letter or referring to the "Refer to" number at the top of the first page of this letter will help to expedite matters. To file an appeal, mail your appeal to:

Deputy Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Room C5-16-03
Baltimore, Maryland 21244-1850

Sincerely,

/s/ Michael S. Marquis
Michael S. Marquis
Director
Freedom of Information Group

[Department of Health & Human Services letterhead]
[STAMP: JUN 26 2006]

Office of Strategic Operations and Regulatory Affairs/ Freedom of Information Group
January 29, 2007

Refer to: C06FOI1318 / C06FOI2229A

Mr. Robert Krughoff, President
Mr. Stephen Albrecht, Esquire
Checkbook/ Center for Study of Services
1625 K Street, N.W., 8th Floor
Washington, D.C. 20006

Dear Mr. Krughoff and Mr. Albrecht:

This letter revises my decision not to comply with your March 27, 2006 Freedom of Information (FOIA) request to obtain a subset of 29 specific data elements from a CMS database containing physician Medicare claims records, for the 2004 calendar year, for the localities of Washington, D.C., Illinois, Maryland, Washington, or Virginia. Specifically, in response to your July 26, 2006 appeal of my decision, CMS has reexamined the processes necessary to extract the requested data with our information technology staff, and we have determined that we will be able to produce the requested information. Once produced, CMS will review the requested information under the FOIA to make our release determination.

You requested a waiver of fees for your FOIA request. Within your March 27, 2006 request, you described your organization, Checkbook / Center for the Study of Services (Checkbook / CSS) as a non-profit entity which conducts studies of consumer services, including

government services, and publishes material which informs or educates consumers concerning those services. You contend a fee waiver is appropriate because providing the requested information will enable Checkbook / CS S to analyze the data and subsequently publish that analysis, which you believe is in the public interest, and will contribute significantly to public scrutiny of the operations of CMS and the Medicare program. You further state that the commercial interests of your organization are not the primary basis for your request.

We have reviewed your fee waiver request under the regulations of the Department of Health and Human Services, in accordance with C.F.R. § 5.45(a), which states: "We will waive or reduce the fees we would otherwise charge if disclosure of the information meets both of the following tests: (1) It is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government; and (2) It is not primarily in the commercial interest of the requester." After careful consideration of the commercial nature in which Checkbook /CSS markets and sells its services, I have concluded that CheckBook /CSS has a primary commercial interest in the requested disclosure and that Checkbook / CSS's commercial interest outweighs the public interest in this matter. I also conclude that you have not demonstrated that disclosure of the requested data will advance the understanding of the general public because disseminating on a subscription or a fee basis will limit the general public's access to the requested data. Therefore, your request fails to satisfy both fee waiver tests, and I cannot grant the requested fee waiver.

To explain, in reviewing your request for a fee waiver, we have carefully examined the evidence of any commercial interest, in relation to any public interest that may exist Within this context, it is appropriate for agencies to consider the identity of the requester, the circumstances surrounding the request, and the manner in which the information will be disseminated. Although a public interest may exist and be served by disclosure of the requested data, its dissemination on a subscription or fee basis limits its public accessibility. Your fee waiver request lacked specificity regarding publication of the requested data and disseminating the data in such a way to provide benefit to a broad public audience. In reviewing the services provided by your organization, as described at your web sites www.checkbook.org and www.cssresearch.org, we noted that Checkbook / CSS charges fees for its survey and research services, to individual consumers, governments, and commercial entities. To illustrate, Checkbook Magazine, a publication which evaluates various services used by consumers, sells its service rating information by subscription in the metropolitan areas where it is published, at subscription rates ranging from $30.00 to $34.00. Checkbook / CSS also sells access to health publications such as the Guide to Health Plans for Federal Employees and the Guide to Top Doctors. Additionally, Checkbook /CSS actively markets itself as an expert in conducting studies, surveys, data collection and analysis, as evidenced by its web site at www.cssresearch.orp/exp.cfm. As an example, Checkbook / CSS describes itself as an approved vendor to administer HCAHPS hospital surveys, for which it charges an annual fee of $2,900. Based upon my review of Checkbook / CSS' activities, I conclude that a commercial interest exists, and your FOIA re-

quest will be assessed fees, under our agency's FOIA fee schedule.

The following fees are estimated to produce the requested data, separated by geographical area, as you requested: each data extraction and production, by state, is estimated to cost $3.944.70. This represents an estimated $315.00 in human resource costs, and $3,629.70 in computer costs to extract and provide the information, on tape or cartridges. Should you decide to obtain all the data in one file, as opposed to receiving separate files for each state, this may lessen your costs. Production of the data may require a three to four week period.

Please let me know whether you agree to pay these fees, so we may continue and complete the processing of your request. Alternatively, please let us know if you would like to amend or narrow your request to reduce costs.

If you disagree with this decision to deny your fee waiver request, you may appeal. Your appeal should be mailed within 30 days of this letter to the: Deputy Administrator, Centers for Medicare & Medicaid Services, Mail Stop C5-2626, 7500 Security Boulevard, Baltimore, Maryland 21244-1850. Please mark your letter "Freedom of Information Act Appeal", and enclose a copy of this letter.

Sincerely,

/s/ Michael S. Marquis
Michael S. Marquis
Director
FOIA Group

[Department of Health & Human Services letterhead]
[STAMP: MAR 16 2007]

RE: Appeal Case Number C07FOI0907A

Mr. Robert Krughoff
President, Checkbook/CSS
1625 K Street, 8th Floor
Washington, D.C. 20006

Dear Mr. Krughoff:

This is in response to your February 28, 2007 letter appealing the decision of Michael S. Marquis, Director, Freedom of Information Group (FIG), Centers for Medicare & Medicaid Services (CMS), to deny your request for a waiver of fees for processing your March 27, 2006 Freedom of Information Act (FOIA) request. Your request sought a subset of 29 specific data elements from a CMS database containing physician Medicare claims records, for the 2004 calendar year, for the localities of Washington, D.C., Illinois, Maryland, Washington, or Virginia. Before rendering my appeal decision, I note that I have been advised that contingent upon the court's final decision on the fee waiver issue in the litigation that is pending over this FOIA request, you are willing to pay the FOIA processing fees for CMS to produce the requested 29 fields of data listed on Attachment A of your request only for those records for which the Line NCH Provider State Code is Washington, D.C. Based upon your agreement to pay, we have initiated production of the requested data. It

will be released to you in full, and without redaction. The estimated computer time to generate the data will be approximately three to four weeks. My appeal ruling follows.

Background: Your original FOIA request sought a subset of 29 specific data elements from a CMS database containing physician Medicare claims records, for the 2004 calendar year, for the localities of Washington, D.C., Illinois, Maryland, Washington, or Virginia. The request also sought a fee waiver. Specifically, your fee waiver request provided that CHECKBOOK/CSS is a non-profit organization that conducts and supports studies of consumer services and publishes reports that educate consumers about such services. Your request also stated that you believed your analysis of the requested data and publication of the findings would contribute significantly to the public's scrutiny of the operation and performance of CMS and the Medicare program. Your request asserted that the commercial interests of CHECKBOOK/CSS are not primary to the FOIA request.

Mr. Marquis' January 29, 2007 letter explained the reasons for the denial. The denial noted that the fee waiver request lacked specificity regarding publication of the requested data and disseminating the data in such a way to provide benefit to a broad public audience. In addition, the denial reviewed the services provided by CHECKBOOK/CSS, as described on the web sites www.checkbook.org and www.cssresearch.org, and noted that CHECKBOOK/CSS charges fees for survey and research services, to individual consumers, governments, and commercial entities. The denial pointed out that Checkbook Magazine, a publication which evaluates various services used by consumers, sells its service rating information by subscription in

the metropolitan areas where it is published, at subscription rates ranging from $30.00 to $34.00. The denial also showed that CHECKBOOK/CSS also sells access to health publications such as the Guide to Health Plans for Federal Employees and the Guide to Top Doctors. Additionally, the denial explained that CHECKBOOK/CSS actively markets itself as an expert in conducting studies, surveys, data collection and analysis, as evidenced by its web site at http://www.cssresearch.org/exp.cfm. In support of his decision concerning the commercial interests of your organization, Mr. Marquis provided an example of CHECKBOOK/CSS' description of itself as an approved vendor to administer Hospital Consumer Assessment of Health Plans (HCAHPS) hospital surveys, for which it charges an annual fee of $2,900. Based on the foregoing, Mr. Marquis found that the commercial interests of CHECKBOOK/CSS were primary to the FOIA request.

You appealed the fee waiver denial on February 28, 2007, arguing that your organization met the Department's public interest criteria for a fee waiver and that the public interest in obtaining the requested records outweighs any commercial interest of your organization.

Analysis of Public Interest: It is the policy of this Department to waive or reduce fees if disclosure of the information meets both the following tests: (1) it is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) it is not primarily in the commercial interest of the requester.

> In analyzing the public interest, we consider the following factors:

(1) How, if at all, do the records to be disclosed pertain to the operations or activities of the Federal Government?

(2) Would disclosure of the records reveal meaningful information about government operations or activities? Can one learn from these records anything about such operations that is not already public knowledge?

(3) Will the disclosure advance the understanding of the general public as distinguished from a narrow segment of interested persons?

(4) Will the contribution to public understanding be a significant one? Will the public's understanding of the government's operations be substantially greater as a result of the disclosure?

With respect to the first two above public interest factors, we do not dispute that the requested records pertains to operations or activities of the Federal Government and that the disclosure of the records would reveal meaningful information about government operations or activities.

With regard to the third public interest factor, we question whether the disclosure will advance the understanding of the general public as distinguished from a narrow segment of interested persons. Your appeal included an attachment of a press release as an example of how your organization releases the results of its quality studies through press releases. This sample press release, in the first two and a half pages, generally explains your organization's 360-page Consumers' Guide to Hospitals (the Guide) and then explains that if consumers want the Guide, they can pay $19.95 or subscribe for two years of online access to the same infor-

mation in the Guide for $19.95. This press release shows that if the public wants access to the full Guide, they have to pay for it, a circumstance which may well limit access to the information.

Your appeal does not specify how the general public's understanding will be advanced in light of the fact that your organization charges for some of the information that it obtains, and it is not clear to us how much your organization intends to charge for the requested records. Your appeal states that your organization often makes free content available on its website. Your appeal, however, does not adequately explain how CHECKBOOK/CSS intends to convey the requested data to the general public. Your amended FOIA request is for 29 data elements about all Medicare physicians in the District of Columbia for the 2004 calendar year. This is a large amount of information, and it is not clear from your appeal how news articles, press releases, or media reports will convey this vast amount of information to the general public.

With respect to the fourth public interest factor, using the sample press release as an example (Exhibit B of your appeal), you haven't shown how releasing a press release of a few pages in length will be a significant contribution to public understanding, in light of the fact that you are requesting 29 data elements for Medicare physicians for the 2004 calendar year. As we noted in our review of the first and second public interest factors, the data you have requested would allow the public to see the volume and types of procedures performed by individual physicians within Washington, D.C. during the one-year period of 2004, specifically for claims submitted to Medicare. While we do not dispute that the number of times a specific procedure is performed may contribute to a physician's expertise and

skill, this quantitative data within a limited context cannot be equated as an overall quality analysis. Nor does this information, in and of itself, shed light upon whether the Medicare program is adequately assessing quality of care issues.

Analysis of Commercial Interest: Even though you did not meet the third and fourth factors of the public interest test, we also considered whether your organization's commercial interest is the primary interest. In determining whether the commercial interest is the primary interest of the requester, HHS considers the following factors:

> (1) Would the disclosure further a commercial interest of the requester, or of someone on whose behalf the requester is acting? "Commercial interests" include interests relating to business, trade, and profit. Not only profit-making corporations have commercial interests—so do nonprofit corporations, individuals, unions, and other associations. The interest of a representative of the news media in using the information for news dissemination purposes will not be considered a commercial interest.
>
> (2) If disclosure would further a commercial interest of the requester, would that effect outweigh the advancement of the public interest defined in paragraph (b) of this section [45 C.F.R. § 5.45]? Which effect is primary?

Within your appeal, you did not challenge the initial denial's assertion that your organization markets itself as an expert in conducting studies, surveys, data collection and analysis. As was also pointed out in the initial denial, your organization has exhibited a pattern of charging consumers and others for certain information

that it obtains. As we previously stated, Exhibit B of your appeal confirms that consumers must pay $19.95 to gain access to the Consumers Guide to Hospitals. In regard to a supporting argument raised on the fourth page of your appeal, in which you stated that CHECKBOOK/CSS has contracted with government agencies to provide federal employees with free access to the Consumers Checkbook Guide to Health Plans, your organization charges the subscribing agencies for this access. The Department of Health and Human Services paid $12,000 to your organization during 2006 for this access. To reiterate a prior example of CHECKBOOK/CSS' commercial activities, your organization is an approved vendor to administer the HCAHPS hospital survey and charges an annual fee of $2,900 to each facility for those services. In addition to those examples of fee-for-service activities, we also note that CHECKBOOK/CSS charges $24.95 for its Guide to Top Doctors, as stated on the website at http://www.checkbook.org/doctors/pageone.cfm, and as also stated in a recent subscription renewal letter to a CHECKBOOK subscriber. That subscription renewal letter stated the following: "You will enjoy ***free*** subscriber-only online access to our nationwide ***Top Doctors*** Ratings to help you find the best health care providers for yourself, your friends, and your family, both locally and nationwide (thousand of consumers pay $24.95 for online access to those ratings alone)".

In addition, your organization's website at http://www.checkbook.org/about.cfm explains that the organization is supported entirely by subscription payments and donations from individual consumers who subscribe to its magazines, and by fees for your survey and information services and books. Even though your website acknowledges that your organization is supported by sub-

scription payments and donations from individual consumers who subscribe to your organization's magazine and by fees for your services and books, your appeal makes a conclusory statement that your commercial interest is "de minimus," and it does not inform us as to how much your organization intends to charge the public for access to the data elements that you are requesting from CMS so we can weigh the commercial interest against the public interest

Conclusion: It is the responsibility of the FOIA requester to demonstrate and substantiate his eligibility for a fee waiver. As a FOIA requester, you have not met this burden, in that you have not satisfactorily established that your organization's commercial interest was not primary, nor have you demonstrated how you would disseminate the requested data to edify and inform a broad segment of the population.

Based upon my careful consideration of your appeal arguments discussed above, I find it both reasonable and warranted that CHECKBOOK/CSS should compensate this agency for the costs of producing the requested data. Therefore, I am upholding the denial of your fee waiver request. Your FOIA request has been placed in the "commercial" fee category; FOIA requesters in this category are charged for search, review, and duplication costs.

This letter constitutes the final decision of the Department of Health and Human Services in the matter. If you disagree with this decision, the law at 5 U.S.C. § 552(a)(4)(B) provides for judicial review in the District of Columbia District Court, or in a U.S. district court where you reside or have your principal place of business, or where the agency records are situated.

Sincerely yours,

/s/ Herb B. Kuhn
Herb B. Kuhn
Acting Deputy Administrator

cc: Mr. Stephen M. Albrecht, Esq.

APPENDIX F

STATUTORY PROVISIONS

5 U.S.C. § 522. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by

computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be

relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in

section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of

the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the

agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in

the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a de-

lay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected

to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the dispo-

sition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and under-

standing of the status of requests, and assisting in the resolution of disputes.

42 U.S.C. § 1320a-7. Exclusion of certain individuals and entities from participation in Medicare and State health care programs

(a) Mandatory exclusion

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):

(1) Conviction of program-related crimes

Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program.

(2) Conviction relating to patient abuse

Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

(3) Felony conviction relating to health care fraud

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony

relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

(4) Felony conviction relating to controlled substance

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

(b) Permissive exclusion

The Secretary may exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a-7b(f) of this title):

(1) Conviction relating to fraud

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law—

(A) of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct—

(i) in connection with the delivery of a health care item or service, or

(ii) with respect to any act or omission in a health care program (other than those specifically described in subsection (a)(1) of this section) operated by or financed in whole or in part by any Federal, State, or local government agency; or

(B) of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any Federal, State, or local government agency.

(2) Conviction relating to obstruction of an investigation

Any individual or entity that has been convicted, under Federal or State law, in connection with the interference with or obstruction of any investigation into any criminal offense described in paragraph (1) or in subsection (a) of this section.

(3) Misdemeanor conviction relating to controlled substance

Any individual or entity that has been convicted, under Federal or State law, of a criminal offense consisting of a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

(4) License revocation or suspension

Any individual or entity—

(A) whose license to provide health care has been revoked or suspended by any State licensing authority, or who otherwise lost such a license or the right to apply for or renew such a license, for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity, or

(B) who surrendered such a license while a formal disciplinary proceeding was pending be-

fore such an authority and the proceeding concerned the individual's or entity's professional competence, professional performance, or financial integrity.

(5) Exclusion or suspension under Federal or State health care program

Any individual or entity which has been suspended or excluded from participation, or otherwise sanctioned, under—

(A) any Federal Program, including programs of the Department of Defense or the Department of Veterans Affairs, involving the provision of health care, or

(B) a State health care program,

for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.

(6) Claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services

Any individual or entity that the Secretary determines—

(A) has submitted or caused to be submitted bills or requests for payment (where such bills or requests are based on charges or cost) under subchapter XVIII of this chapter or a State health care program containing charges (or, in applicable cases, requests for payment of costs) for items or services furnished substantially in excess of such individual's or entity's usual charges (or, in applicable cases, substantially in excess of such individual's or entity's costs) for

such items or services, unless the Secretary finds there is good cause for such bills or requests containing such charges or costs;

(B) has furnished or caused to be furnished items or services to patients (whether or not eligible for benefits under subchapter XVIII of this chapter or under a State health care program) substantially in excess of the needs of such patients or of a quality which fails to meet professionally recognized standards of health care;

(C) is—

(i) a health maintenance organization (as defined in section 1396b(m) of this title) providing items and services under a State plan approved under subchapter XIX of this chapter, or

(ii) an entity furnishing services under a waiver approved under section 1396n(b)(1) of this title,

and has failed substantially to provide medically necessary items and services that are required (under law or the contract with the State under subchapter XIX of this chapter) to be provided to individuals covered under that plan or waiver, if the failure has adversely affected (or has a substantial likelihood of adversely affecting) these individuals; or

(D) is an entity providing items and services as an eligible organization under a risk-sharing contract under section 1395mm of this title and has failed substantially to provide medically

necessary items and services that are required (under law or such contract) to be provided to individuals covered under the risk-sharing contract, if the failure has adversely affected (or has a substantial likelihood of adversely affecting) these individuals.

(7) Fraud, kickbacks, and other prohibited activities

Any individual or entity that the Secretary determines has committed an act which is described in section 1320a-7a, 1320a-7b, or 1320a-8 of this title.

(8) Entities controlled by a sanctioned individual

Any entity with respect to which the Secretary determines that a person—

(A)(i) who has a direct or indirect ownership or control interest of 5 percent or more in the entity or with an ownership or control interest (as defined in section 1320a-3(a)(3) of this title) in that entity,

(ii) who is an officer, director, agent, or managing employee (as defined in section 1320a-5(b) of this title) of that entity; or

(iii) who was described in clause (i) but is no longer so described because of a transfer of ownership or control interest, in anticipation of (or following) a conviction, assessment, or exclusion described in subparagraph (B) against the person, to an immediate family member (as defined in subsection (j)(1) of this section) or a member of the household of the person (as defined in subsection (j)(2) of this section) who continues to maintain an interest described in such clause—

is a person—

(B)(i) who has been convicted of any offense described in subsection (a) of this section or in paragraph (1), (2), or (3) of this subsection;

(ii) against whom a civil monetary penalty has been assessed under section 1320a-7a or 1320a-8 of this title; or

(iii) who has been excluded from participation under a program under subchapter XVIII of this chapter or under a State health care program.

(9) Failure to disclose required information

Any entity that did not fully and accurately make any disclosure required by section 1320a-3 of this title, section 1320a-3a of this title, or section 1320a-5 of this title.

(10) Failure to supply requested information on subcontractors and suppliers

Any disclosing entity (as defined in section 1320a-3(a)(2) of this title) that fails to supply (within such period as may be specified by the Secretary in regulations) upon request specifically addressed to the entity by the Secretary or by the State agency administering or supervising the administration of a State health care program—

(A) full and complete information as to the ownership of a subcontractor (as defined by the Secretary in regulations) with whom the entity has had, during the previous 12 months, business transactions in an aggregate amount in excess of $25,000, or

(B) full and complete information as to any significant business transactions (as defined by the Secretary in regulations), occurring during the five-year period ending on the date of such request, between the entity and any wholly owned supplier or between the entity and any subcontractor.

(11) Failure to supply payment information

Any individual or entity furnishing items or services for which payment may be made under subchapter XVIII of this chapter or a State health care program that fails to provide such information as the Secretary or the appropriate State agency finds necessary to determine whether such payments are or were due and the amounts thereof, or has refused to permit such examination of its records by or on behalf of the Secretary or that agency as may be necessary to verify such information.

(12) Failure to grant immediate access

Any individual or entity that fails to grant immediate access, upon reasonable request (as defined by the Secretary in regulations) to any of the following:

(A) To the Secretary, or to the agency used by the Secretary, for the purpose specified in the first sentence of section 1395aa(a) of this title (relating to compliance with conditions of participation or payment).

(B) To the Secretary or the State agency, to perform the reviews and surveys required under State plans under paragraphs (26), (31), and (33) of section 1396a(a) of this title and under section 1396b(g) of this title.

(C) To the Inspector General of the Department of Health and Human Services, for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General.

(D) To a State medicaid fraud control unit (as defined in section 1396b(q) of this title), for the purpose of conducting activities described in that section.

(13) Failure to take corrective action

Any hospital that fails to comply substantially with a corrective action required under section 1395ww(f)(2)(B) of this title.

(14) Default on health education loan or scholarship obligations

Any individual who the Secretary determines is in default on repayments of scholarship obligations or loans in connection with health professions education made or secured, in whole or in part, by the Secretary and with respect to whom the Secretary has taken all reasonable steps available to the Secretary to secure repayment of such obligations or loans, except that (A) the Secretary shall not exclude pursuant to this paragraph a physician who is the sole community physician or sole source of essential specialized services in a community if a State requests that the physician not be excluded, and (B) the Secretary shall take into account, in determining whether to exclude any other physician pursuant to this paragraph, access of beneficiaries to physician services for which payment may be made under subchapter XVIII or XIX of this chapter.

(15) Individuals controlling a sanctioned entity

(A) Any individual—

(i) who has a direct or indirect ownership or control interest in a sanctioned entity and who knows or should know (as defined in section 1320a-7a(i)(6) of this title) of the action constituting the basis for the conviction or exclusion described in subparagraph (B); or

(ii) who is an officer or managing employee (as defined in section 1320a-5(b) of this title) of such an entity.

(B) For purposes of subparagraph (A), the term "sanctioned entity" means an entity—

(i) that has been convicted of any offense described in subsection (a) of this section or in paragraph (1), (2), or (3) of this subsection; or

(ii) that has been excluded from participation under a program under subchapter XVIII of this chapter or under a State health care program.

(c) Notice, effective date, and period of exclusion

(1) An exclusion under this section or under section 1320a-7a of this title shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations consistent with paragraph (2).

(2)(A) Except as provided in subparagraph (B), such an exclusion shall be effective with respect to services furnished to an individual on or after the effective date of the exclusion.

(B) Unless the Secretary determines that the health and safety of individuals receiving services warrants the exclusion taking effect earlier, an exclusion shall not apply to payments made under subchapter XVIII of this chapter or under a State health care program for—

(i) inpatient institutional services furnished to an individual who was admitted to such institution before the date of the exclusion, or

(ii) home health services and hospice care furnished to an individual under a plan of care established before the date of the exclusion,

until the passage of 30 days after the effective date of the exclusion.

(3)(A) The Secretary shall specify, in the notice of exclusion under paragraph (1) and the written notice under section 1320a-7a of this title, the minimum period (or, in the case of an exclusion of an individual under subsection (b)(12) of this section or in the case described in subparagraph (G), the period) of the exclusion.

(B) Subject to subparagraph (G), in the case of an exclusion under subsection (a) of this section, the minimum period of exclusion shall be not less than five years, except that, upon the request of the administrator of a Federal health care program (as defined in section 1320-7b(f) of this title) who determines that the exclusion would impose a hardship on individuals entitled to benefits under part A of subchapter XVIII of this chapter or enrolled under part B of subchapter VIII of this chapter, or both, the Secretary may, after consulting with the Inspector General of the Department of Health and Human Services, waive the exclusion under

subsection (a)(1), (a)(3), or (a)(4) of this section with respect to that program in the case of an individual or entity that is the sole community physician or sole source of essential specialized services in a community. The Secretary's decision whether to waive the exclusion shall not be reviewable.

(C) In the case of an exclusion of an individual under subsection (b)(12) of this section, the period of the exclusion shall be equal to the sum of—

(i) the length of the period in which the individual failed to grant the immediate access described in that subsection, and

(ii) an additional period, not to exceed 90 days, set by the Secretary.

(D) Subject to subparagraph (G), in the case of an exclusion of an individual or entity under paragraph (1), (2), or (3) of subsection (b) of this section, the period of the exclusion shall be 3 years, unless the Secretary determines in accordance with published regulations that a shorter period is appropriate because of mitigating circumstances or that a longer period is appropriate because of aggravating circumstances.

(E) In the case of an exclusion of an individual or entity under subsection (b)(4) or (b)(5) of this section, the period of the exclusion shall not be less than the period during which the individual's or entity's license to provide health care is revoked, suspended, or surrendered, or the individual or the entity is excluded or suspended from a Federal or State health care program.

(F) In the case of an exclusion of an individual or entity under subsection (b)(6)(B) of this section, the period of the exclusion shall be not less than 1 year.

(G) In the case of an exclusion of an individual under subsection (a) of this section based on a conviction occurring on or after August 5, 1997, if the individual has (before, on, or after August 5, 1997) been convicted—

(i) on one previous occasion of one or more offenses for which an exclusion may be effected under such subsection, the period of the exclusion shall be not less than 10 years, or

(ii) on 2 or more previous occasions of one or more offenses for which an exclusion may be effected under such subsection, the period of the exclusion shall be permanent.

(d) Notice to State agencies and exclusion under State health care programs

(1) Subject to paragraph (3), the Secretary shall exercise the authority under this section and section 1320a-7a of this title in a manner that results in an individual's or entity's exclusion from all the programs under subchapter XVIII of this chapter and all the State health care programs in which the individual or entity may otherwise participate.

(2) The Secretary shall promptly notify each appropriate State agency administering or supervising the administration of each State health care program (and, in the case of an exclusion effected pursuant to subsection (a) of this section and to which section 824(a)(5) of Title 21 may apply, the Attorney General)—

(A) of the fact and circumstances of each exclusion effected against an individual or entity under this section or section 1320a-7a of this title, and

(B) of the period (described in paragraph (3)) for which the State agency is directed to exclude the

individual or entity from participation in the State health care program.

(3)(A) Except as provided in subparagraph (B), the period of the exclusion under a State health care program under paragraph (2) shall be the same as any period of exclusion under subchapter XVIII of this chapter.

(B)(i) The Secretary may waive an individual's or entity's exclusion under a State health care program under paragraph (2) if the Secretary receives and approves a request for the waiver with respect to the individual or entity from the State agency administering or supervising the administration of the program.

(ii) A State health care program may provide for a period of exclusion which is longer than the period of exclusion under subchapter XVIII of this chapter.

(e) Notice to State licensing agencies

The Secretary shall—

(1) promptly notify the appropriate State or local agency or authority having responsibility for the licensing or certification of an individual or entity excluded (or directed to be excluded) from participation under this section or section 1320a-7a of this title, of the fact and circumstances of the exclusion,

(2) request that appropriate investigations be made and sanctions invoked in accordance with applicable State law and policy, and

(3) request that the State or local agency or authority keep the Secretary and the Inspector General of the Department of Health and Human Services fully and currently informed with respect to any actions taken in response to the request.

(f) Notice, hearing, and judicial review

(1) Subject to paragraph (2), any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and section 405(l) of this title, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

(2) Unless the Secretary determines that the health or safety of individuals receiving services warrants the exclusion taking effect earlier, any individual or entity that is the subject of an adverse determination under subsection (b)(7) of this section shall be entitled to a hearing by an administrative law judge (as provided under section 405(b) of this title) on the determination under subsection (b)(7) of this section before any exclusion based upon the determination takes effect.

(3) The provisions of section 405(h) of this title shall apply with respect to this section and sections 1320a-7a, 1320a-8, and 1320c-5 of this title to the same extent as it is applicable with respect to subchapter II of this chapter, except that, in so applying such section and section 405(l) of this title, any reference therein to the Commissioner of Social Security shall be considered a reference to the Secretary.

(g) Application for termination of exclusion

(1) An individual or entity excluded (or directed to be excluded) from participation under this section or section 1320a-7a of this title may apply to the Secretary, in

the manner specified by the Secretary in regulations and at the end of the minimum period of exclusion provided under subsection (c)(3) of this section and at such other times as the Secretary may provide, for termination of the exclusion effected under this section or section 1320a-7a of this title.

(2) The Secretary may terminate the exclusion if the Secretary determines, on the basis of the conduct of the applicant which occurred after the date of the notice of exclusion or which was unknown to the Secretary at the time of the exclusion, that—

(A) there is no basis under subsection (a) or (b) of this section or section 1320a-7a(a) of this title for a continuation of the exclusion, and

(B) there are reasonable assurances that the types of actions which formed the basis for the original exclusion have not recurred and will not recur.

(3) The Secretary shall promptly notify each appropriate State agency administering or supervising the administration of each State health care program (and, in the case of an exclusion effected pursuant to subsection (a) of this section and to which section 824(a)(5) of Title 21 may apply, the Attorney General) of the fact and circumstances of each termination of exclusion made under this subsection.

(h) "State health care program" defined

For purposes of this section and sections 1320a-7a and 1320a-7b of this title, the term "State health care program" means—

(1) a State plan approved under subchapter XIX of this chapter,

(2) any program receiving funds under subchapter V of this chapter or from an allotment to a State under such subchapter,

(3) any program receiving funds under subchapter XX of this chapter or from an allotment to a State under such subchapter, or

(4) a State child health plan approved under subchapter XXI of this chapter.

(i) "Convicted" defined

For purposes of subsections (a) and (b) of this section, an individual or entity is considered to have been "convicted" of a criminal offense—

(1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

(2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;

(3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

(4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

(j) Definition of immediate family member and member of household

For purposes of subsection (b)(8)(A)(iii) of this section:

(1) The term "immediate family member" means, with respect to a person—

(A) the husband or wife of the person;

(B) the natural or adoptive parent, child, or sibling of the person;

(C) the stepparent, stepchild, stepbrother, or stepsister of the person;

(D) the father-, mother-, daughter-, son-, brother-, or sister-in-law of the person;

(E) the grandparent or grandchild of the person; and

(F) the spouse of a grandparent or grandchild of the person.

(2) The term "member of the household" means, with respect to any person, any individual sharing a common abode as part of a single family unit with the person, including domestic employees and others who live together as a family unit, but not including a roomer or boarder.

42 U.S.C. § 1395y. Exclusions from coverage and medicare as secondary payer

(a) Items or services specifically excluded

Notwithstanding any other provision of this subchapter, no payment may be made under part A or part B of this subchapter for any expenses incurred for items or services—

(1)(A) which, except for items and services described in a succeeding subparagraph or additional preventive services (as described in section

1395x(ddd)(1) of this title), are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member,

(B) in the case of items and services described in section 1395x(s)(10) of this title, which are not reasonable and necessary for the prevention of illness,

(C) in the case of hospice care, which are not reasonable and necessary for the palliation or management of terminal illness,

(D) in the case of clinical care items and services provided with the concurrence of the Secretary and with respect to research and experimentation conducted by, or under contract with, the Medicare Payment Advisory Commission or the Secretary, which are not reasonable and necessary to carry out the purposes of section 1395ww(e)(6) of this title,

(E) in the case of research conducted pursuant to section 1320b-12 of this title, which is not reasonable and necessary to carry out the purposes of that section,

(F) in the case of screening mammography, which is performed more frequently than is covered under section 1395m(c)(2) of this title or which is not conducted by a facility described in section 1395m(c)(1)(B) of this title, in the case of screening pap smear and screening pelvic exam, which is performed more frequently than is provided under section 1395x(nn) of this title, and, in the case of screening for glaucoma, which is performed more frequently than is provided under section 1395x(uu)

of this title,

(G) in the case of prostate cancer screening tests (as defined in section 1395x(oo) of this title), which are performed more frequently than is covered under such section,

(H) in the case of colorectal cancer screening tests, which are performed more frequently than is covered under section 1395m(d) of this title,

(I) the frequency and duration of home health services which are in excess of normative guidelines that the Secretary shall establish by regulation,

(J) in the case of a drug or biological specified in section 1395w-3a(c)(6)(C) of this title for which payment is made under part B that is furnished in a competitive area under section 1395w-3b of this title, that is not furnished by an entity under a contract under such section,

(K) in the case of an initial preventive physical examination, which is performed more than 1 year after the date the individual's first coverage period begins under part B of this subchapter,

(L) in the case of cardiovascular screening blood tests (as defined in section 1395x(xx)(1) of this title), which are performed more frequently than is covered under section 1395x(xx)(2) of this title,

(M) in the case of a diabetes screening test (as defined in section 1395x(yy)(1) of this title), which is performed more frequently than is covered under section 1395x(yy)(3) of this title,

(N) in the case of ultrasound screening for abdominal aortic aneurysm which is performed more fre-

quently than is provided for under section 1395x(s)(2)(AA) of this title, and

(O) in the case of kidney disease education services (as defined in paragraph (1) of section 1395x(ggg) of this title), which are furnished in excess of the number of sessions covered under paragraph (4) of such section;

(2) for which the individual furnished such items or services has no legal obligation to pay, and which no other person (by reason of such individual's membership in a prepayment plan or otherwise) has a legal obligation to provide or pay for, except in the case of Federally qualified health center services;

(3) which are paid for directly or indirectly by a governmental entity (other than under this chapter and other than under a health benefits or insurance plan established for employees of such an entity), except in the case of rural health clinic services, as defined in section 1395x(aa)(1) of this title, in the case of Federally qualified health center services, as defined in section 1395x(aa)(3) of this title, in the case of services for which payment may be made under section 1395qq(e) of this title, and in such other cases as the Secretary may specify;

(4) which are not provided within the United States (except for inpatient hospital services furnished outside the United States under the conditions described in section 1395f(f) of this title and, subject to such conditions, limitations, and requirements as are provided under or pursuant to this subchapter, physicians' services and ambulance services furnished an individual in conjunction with such inpatient hospital services but only for the period dur-

ing which such inpatient hospital services were furnished);

(5) which are required as a result of war, or of an act of war, occurring after the effective date of such individual's current coverage under such part;

(6) which constitute personal comfort items (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(7) where such expenses are for routine physical checkups, eyeglasses (other than eyewear described in section 1395x(s)(8) of this title) or eye examinations for the purpose of prescribing, fitting, or changing eyeglasses, procedures performed (during the course of any eye examination) to determine the refractive state of the eyes, hearing aids or examinations therefor, or immunizations (except as otherwise allowed under section 1395x(s)(10) of this title and subparagraph (B), (F), (G), (H), or (K) of paragraph (1);

(8) where such expenses are for orthopedic shoes or other supportive devices for the feet, other than shoes furnished pursuant to section 1395x(s)(12) of this title;

(9) where such expenses are for custodial care (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(10) where such expenses are for cosmetic surgery or are incurred in connection therewith, except as required for the prompt repair of accidental injury or for improvement of the functioning of a malformed body member;

(11) where such expenses constitute charges imposed by immediate relatives of such individual or members of his household;

(12) where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth, except that payment may be made under part A of this subchapter in the case of inpatient hospital services in connection with the provision of such dental services if the individual, because of his underlying medical condition and clinical status or because of the severity of the dental procedure, requires hospitalization in connection with the provision of such services;

(13) where such expenses are for—

(A) the treatment of flat foot conditions and the prescription of supportive devices therefor,

(B) the treatment of subluxations of the foot, or

(C) routine foot care (including the cutting or removal of corns or calluses, the trimming of nails, and other routine hygienic care);

(14) which are other than physicians' services (as defined in regulations promulgated specifically for purposes of this paragraph), services described by section 1395x(s)(2)(K) of this title, certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist, and which are furnished to an individual who is a patient of a hospital or critical access hospital by an entity other than the hospital or critical access hospital, unless the services are furnished under arrangements (as defined in section

1395x(w)(1) of this title) with the entity made by the hospital or critical access hospital;

(15)(A) which are for services of an assistant at surgery in a cataract operation (including subsequent insertion of an intraocular lens) unless, before the surgery is performed, the appropriate utilization and quality control peer review organization (under part B of subchapter XI of this chapter) or a carrier under section 1395u of this title has approved of the use of such an assistant in the surgical procedure based on the existence of a complicating medical condition, or

(B) which are for services of an assistant at surgery to which section 1395w-4(i)(2)(B) of this title applies;

(16) in the case in which funds may not be used for such items and services under the Assisted Suicide Funding Restriction Act of 1997;

(17) where the expenses are for an item or service furnished in a competitive acquisition area (as established by the Secretary under section 1395w-3(a) of this title) by an entity other than an entity with which the Secretary has entered into a contract under section 1395w-3(b) of this title for the furnishing of such an item or service in that area, unless the Secretary finds that the expenses were incurred in a case of urgent need, or in other circumstances specified by the Secretary;

(18) which are covered skilled nursing facility services described in section 1395yy(e)(2)(A)(i) of this title and which are furnished to an individual who is a resident of a skilled nursing facility during a period in which the resident is provided covered post-

hospital extended care services (or, for services described in section 1395x(s)(2)(D) of this title, which are furnished to such an individual without regard to such period), by an entity other than the skilled nursing facility, unless the services are furnished under arrangements (as defined in section 1395x(w)(1) of this title) with the entity made by the skilled nursing facility;

(19) which are for items or services which are furnished pursuant to a private contract described in section 1395a(b) of this title;

(20) in the case of outpatient physical therapy services, outpatient speech-language pathology services, or outpatient occupational therapy services furnished as an incident to a physician's professional services (as described in section 1395x(s)(2)(A) of this title), that do not meet the standards and conditions (other than any licensing requirement specified by the Secretary) under the second sentence of section 1395x(p) of this title (or under such sentence through the operation of subsection (g) or (ll)(2) of section 1395x of this title) as such standards and conditions would apply to such therapy services if furnished by a therapist;

(21) where such expenses are for home health services (including medical supplies described in section 1395x(m)(5) of this title, but excluding durable medical equipment to the extent provided for in such section) furnished to an individual who is under a plan of care of the home health agency if the claim for payment for such services is not submitted by the agency;

Supreme Court, U.S.
FILED
MAR 15 2010
OFFICE OF THE CLERK

No. 09-538

IN THE

Supreme Court of the United States

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, SECRETARY OF HEALTH & HUMAN SERVICES, ACTING ADMINISTRATOR OF THE CENTERS FOR MEDICARE & MEDICAID SERVICES, AND AMERICAN MEDICAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN MEDICAL ASSOCIATION IN OPPOSITION

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QUESTION PRESENTED

Did the United States Department of Health and Human Services (HHS) properly withhold records requested by petitioner under the Freedom of Information Act, 5 U.S.C. § 552, where the records would reveal the amount of income received by individually identified physicians for treating Medicare patients, and where HHS was enjoined from releasing the requested records?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, the American Medical Association states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF OF RESPONDENT AMERICAN MEDICAL ASSOCIATION IN OPPOSITION

The American Medical Association ("AMA") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Consumers' Checkbook, Center for the Study of Services ("Checkbook").

COUNTERSTATEMENT OF THE CASE

Checkbook has sought records of HHS that, when juxtaposed with readily available public data, reveal the personal financial information of individually identified physicians treating Medicare patients. *See* App. 6a. Two courts of appeals have now held, on independent grounds, that those records are not subject to disclosure. In the case below, the D.C. Circuit held that the records are exempt from disclosure requirements under FOIA because disclosure would constitute a clearly unwarranted invasion of physicians' privacy. App. 17a; *see also* 5 U.S.C. § 552(b)(6). Contrary to Checkbook's argument, that court did not hold that "[t]he public interest in monitoring agency performance is ... limited to circumstances in which the agency is pursuing a highly specific statutory function." Pet. 13. Rather, the court considered what "operations or activities" of HHS the requested records could reveal, App. 7a (internal quotation marks and emphasis omitted), and concluded as a factual matter that those records would not "shed any additional light" on HHS's "'performance in maintaining and enhancing the quality and efficiency of services provided under the Medicare program'" or on "'the agency's ability to

root out Medicare fraud and waste.'" *Id.* at 7a, 11a; *see generally id.* at 7a-16a.

Subsequently, the Eleventh Circuit held that disclosure of substantially identical Medicare records was barred by an injunction entered by the District Court for the Middle District of Florida in 1979. *Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1210 (11th Cir. 2009). The Eleventh Circuit did not consider the application of Exemption 6 to the requested records. *Id.* at 1201 n.9.[1] The D.C. Circuit, for its part, declined to reach the effect of the injunction on Checkbook's request for records. App. 4a n.3. However, both courts concluded that HHS acted properly in withholding the records.

The decision below is an application of well-settled law to the facts before the court. That opinion does not conflict with any holding of this Court or of any court of appeals. Moreover, the result in the D.C. Circuit accords with the result in the Eleventh Circuit—even though the cases were decided on different grounds. There is nothing in the decision below that warrants this Court's review.

I. PROCEEDINGS IN THE DISTRICT COURT

This litigation began when Checkbook claimed under FOIA, 5 U.S.C. § 552, that HHS had improperly withheld from disclosure certain Medicare claims records. App. 2a-3a. These records indicate the total number of each specific procedure performed for Medicare patients by individually identified physicians in four states and the District of Columbia. *Id.* When combined with publicly available fee schedules, the records would reveal "the total payments Medi-

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[1] The decision in *Alley* is not before this Court.

care made to any individually identified physician for claims submitted in 2004." *Id.* at 3a.

HHS argued in the district court that it was not required under FOIA to disclose the records for two separate and independent reasons. First, FOIA Exemption 6, 5 U.S.C. § 552(b)(6), permits the agency to withhold the records in order to preserve physicians' personal privacy. App. 3a. Second, the injunction entered in *Florida Medical Ass'n v. HEW*, 479 F. Supp. 1291 (M.D. Fla. 1979) ("*FMA*"), bars disclosure of the records. App. 3a. More specifically, the *FMA* order provides that any "disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would personally and individually identify the providers of services under the Medicare program who are members of the recertified class in this case is declared to be contrary to federal law." JA296; *see also Alley*, 590 F.3d at 1201. It permanently enjoins such disclosure. JA296.

HHS asserted that the records sought by Checkbook were covered by the *FMA* injunction because they would disclose annual Medicare reimbursement amounts in a manner that would personally identify physicians who were members of the recertified class in *FMA* (which included all AMA members, all Florida physicians, and all members of the Florida Medical Association) and who treated Medicare patients. Rejecting both of HHS's arguments, the district court granted summary judgment to Checkbook. It ordered HHS to disclose the requested records. App. 55a.

II. PROCEEDINGS IN THE COURT OF APPEALS

The AMA was a plaintiff in the *FMA* litigation, and its members' privacy interests are directly at stake

here. The AMA was thus permitted to intervene in the D.C. Circuit. *See* App. 1a.

Expressly declining to reach the effect of the *FMA* injunction, App. 4a n.3, the D.C. Circuit held that FOIA Exemption 6 applied and upheld the decision of HHS not to disclose the records. The court first recognized, in accord with longstanding precedent, that physicians have a substantial privacy interest in their financial information. *Id.* at 5a-7a. The court explained that a substantial privacy interest exists even though the requested records would "not reveal completely an individual's personal finances," and even though "the payments relate to business activities and not personal finances." *Id.* at 6a (citing *Multi AG Media v. Dep't of Agric.*, 515 F.3d 1224, 1228-29 (D.C. Cir. 2008); *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988)).

The court next concluded that no public interest in disclosure outweighed that privacy interest. Applying precedent of this Court, it noted that, "[t]he only relevant public interest in disclosure 'is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding *of the operations or activities of the government.*"'" App. 7a (emphasis and second alteration in original) (citing *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994)).

It examined whether the requested records would serve the public interest by revealing information about "'HHS's performance in maintaining and enhancing the quality and efficiency of services provided under the Medicare program.'" App. 7a. The court found, as a factual matter, that Checkbook had failed to identify how the records could be used to evaluate HHS's performance in that regard. *Id.* at 9a-11a.

The D.C. Circuit went on to state that "[e]ven if the requested data could be used to measure the quality of care provided by Medicare-enrolled physicians," it would still not provide information as to *HHS's* performance. App. 11a. As the court explained, "[w]hile [HHS] has certain responsibilities to promote quality healthcare for Medicare beneficiaries," federal law prevents the agency from "'exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services.'" *Id.* at 8a (citing 42 U.S.C. § 1395). And the requested records provide no information as to any other activity actually undertaken by HHS to promote physician quality. *Id.* at 11a-12a.

The D.C. Circuit next considered whether the requested records would "serve the public interest by revealing fraudulent Medicare claims made by physicians." App. 12a. On this point, the court found that Checkbook had "not provided any evidence of alleged fraud the requested data would reveal." *Id.* Likewise, although Checkbook argued "that the requested data will shed light on whether HHS is complying with its own transparency initiatives," the court concluded that the requested records would not "assist the public" in making that determination. *Id.* at 14a-15a. In sum, because the data Checkbook seeks would not help the public to evaluate HHS's operations or activities, "the requested data does not serve any FOIA-related public interest in disclosure." *Id.* at 16a.

Concurring in part and dissenting in part, Judge Rogers disagreed with the majority's balancing of the public and private interests under FOIA Exempt-

ion 6. App. 21a-30a. She agreed, however, that affirmance of the district court's order was inappropriate. Instead, she found that the case should be remanded for further proceedings to determine whether disclosure was barred under the *FMA* injunction. *Id.* at 34a-35a. The D.C. Circuit denied Checkbook's request for *en banc* rehearing over the dissent of three judges. *Id.* at 59a-60a.

III. THE ELEVENTH CIRCUIT'S DECISION IN *ALLEY*

Although the D.C. Circuit declined to reach the effect of the *FMA* injunction on Checkbook's FOIA request, the Eleventh Circuit subsequently decided in *Alley* that that injunction barred HHS from disclosing materially identical records. 590 F.3d 1195. As that court explained, "[t]he language of the *FMA* injunction is broad. It permanently enjoins disclosure of 'any list' of annual Medicare reimbursement amounts, 'for any years,' if disclosing it would identify members of the recertified class." *Id.* at 1207. Thus, "[b]ecause the *FMA* injunction, reasonably construed, covers the subject matter of Alley's FOIA request, we conclude that HHS did not 'improperly' withhold those records under the FOIA." *Id.* at 1210 (citing *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 385-87 (1980)).

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW ACCORDS WITH PRECEDENT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANOTHER COURT OF APPEALS.

The panel's decision in this case was a reasoned application of well-settled precedent to the relevant facts. Each step of the majority's analysis conformed

to principles previously set forth by this Court, the D.C. Circuit, and other courts of appeals. There is, therefore, no reason for this Court to grant the petition.

A. The D.C. Circuit Did Not Impose Any Novel Requirement For The Establishment Of A Public Interest Under FOIA.

Petitioner asserts that the D.C. Circuit held "that information requested under FOIA must relate to a specific statutory agency duty in order to establish a public interest cognizable under Exemption 6." Pet. 13. This assertion distorts the D.C. Circuit's opinion. Nothing in that opinion imposes any novel requirement for disclosure under FOIA.

Because the requested records implicate physicians' personal privacy, the D.C. Circuit was obligated to weigh that privacy interest against "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994) (alteration in original) (quoting *U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989)). Contrary to petitioner's argument, the D.C. Circuit did not find that a public interest in disclosure exists only as to "circumstances in which the agency is pursuing a highly specific statutory function, as opposed to carrying out its broader mandates." Pet. 13. The court instead ruled that even though there may exist a public interest in disclosure of information that would broadly "shed light on HHS's performance of its mission to promote quality healthcare for Medicare beneficiaries," App. 9a, or "reveal[] fraudulent Medicare claims made by physicians," *id.* at 12a, the specific data that petitioner requested

would not, as a factual matter, "assist the public" in evaluating the agency's conduct, *id.* at 15a.

1. To begin, the D.C. Circuit assumed a public interest in learning about HHS's performance of its overall "mission to promote quality healthcare for Medicare beneficiaries." App. 9a. The court then went on to consider as a factual matter whether the requested records would actually shed light on that performance. Closely examining the specific information included in the records sought by Checkbook, the court concluded that they would not.

As the court recognized, Checkbook's position "rests on the assumption that the frequency with which a physician performs a medical procedure indicates the quality of the procedure." App. 9a. The court noted that there is an ongoing debate in the medical community as to whether the evidence supports that premise. *See id.* (citing conflicting academic literature). But even if quantity of procedures offers some informative value, quantity alone—which is all the requested records offer—is not a useful indicator. *See, e.g.*, Paul Tang et al., *Comparison of Methodologies for Calculating Quality Measures Based on Administrative Data Versus Clinical Data from an Electronic Health Record System: Implications for Performance Measures*, 14 J. Am. Med. Infomatics Assoc. 10, 10-11 (2007) ("To be useful, a quality measure should be precisely defined, tied causally to an outcome, and affected by processes that the providers and/or the patients control.... Relying on administrative data from billing systems to deduce clinical context violates this principle and often produces misleading results that may lead to misinformed policymaking."); Kathryn Phillips & Harold Luft, *The Policy Implications of Using Hospital and Physician Volumes as "Indicators" of*

Quality of Care in a Changing Health Care Environment, 9 Int'l J. for Quality in Health Care 341, 345 (1997).

Even assuming, however, that meaningful information can be derived from the bare number of procedures that a physician performs, the informational value of the records Checkbook seeks is yet more attenuated. As the D.C. Circuit recognized, "the data [Checkbook] requests will not indicate total volume because it does not include procedures performed by physicians for non-Medicare patients." App. 10a. Medicare, although large, is still only one of many health insurers. Medicare claims data would not reveal enough about most physicians' practices to gauge accurately which physicians perform the greatest number of procedures. Moreover, the requested data includes only fee-for-service claims submitted to Medicare. It does not cover services provided under Medicare Advantage, the managed care option for Medicare beneficiaries. *See* JA16-18; *Medicare Utilization—Standard Analytic Files (SAFs)*, *available at* http://aspe.hhs.gov/hsp/06/Catalog-AI-AN-NA/MU-SAFs.htm.

The court also rejected Checkbook's claim—reiterated here—that disclosure of the requested records would demonstrate "the extent to which physicians are providing all services required to reach standards of recommended care." Pet. 24. As the D.C. Circuit found, Checkbook has never been able to "explain how the requested data can be used to perform this analysis." App. 11a. Without patient-identifying information, which Checkbook does not seek, the requested data will not permit Checkbook to determine which procedures physicians performed for which patients.

In sum, the D.C. Circuit rejected Checkbook's assertion that the requested records would permit the public to determine whether Medicare was properly promoting physician quality—not because the court imposed some novel legal requirement, but because Checkbook failed to establish the required connection between the records and the asserted public interest. As the court's factual analysis concluded, Checkbook offered "nothing [that] indicates that a physician who performs a procedure less often fails to meet recognized standards of health care." App. 12a. It is Checkbook's failure to carry its burden and not a novel interpretation of FOIA that underlies the court's holding that the requested records would shed no light on HHS's performance of any obligation—statutory or otherwise—to promote physician quality.

2. After having found that the records at issue would not reveal whether HHS was promoting physician quality, the D.C. Circuit went on to conclude that "[e]ven if," contrary to fact, "the requested data could be used to measure the quality of care provided by Medicare-enrolled physicians, it would not shed light on the 'agency's performance of its statutory duties.'" App. 11a (quoting *Reporters Comm.*, 489 U.S. at 773). This conclusion, too, was not based on a novel rule of law, but on the fact that the agency plays no role in selecting which physicians will treat Medicare beneficiaries. *Id.* at 8a-9a. Indeed, the agency is statutorily barred from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any ... person providing health services." 42 U.S.C. § 1395; *see also* App. 8a.

This fact belies petitioner's claim that the requested records would shed light on *HHS's* actions

by permitting the public "to tabulate the number of times that Medicare-enrolled physicians have performed particular procedures." Pet. 23. Even if, as petitioner asserts, such a bare tabulation of the number of procedures performed by a physician for Medicare beneficiaries would demonstrate something about the quality of care provided by that physician, it would show nothing about HHS's performance because the agency does not and may not play any role in the selection of which Medicare-enrolled physician will treat a Medicare beneficiary. Thus, records indicating whether *Medicare beneficiaries* choose to be treated by more or less experienced physicians reveal nothing about "'the operations or activities of *the government*.'" *FLRA*, 510 U.S. at 495 (emphasis omitted and added) (quoting *Reporters Comm.*, 489 U.S. at 775); *see also* App. 7a.

This essential fact likewise distinguishes this case from the two opinions of this Court cited by petitioner for the proposition that FOIA disclosure extends beyond an agency's performance of "statutory dut[ies]." Pet. 17-18. Regardless of whether the agency is performing a duty imposed by statute, these cases make clear that disclosure is required under FOIA only where it is the *agency* that is acting. In *United States Department of State v. Ray*, 502 U.S. 164 (1991), this Court found that the FOIA claimant was entitled to disclosure of materials that would be informative as to "*the State Department's performance* of its duty to monitor Haitian compliance with the promise not to prosecute the returnees." *Id.* at 178 (emphasis added). In *National Archives & Records Administration v. Favish*, this Court found that petitioner had stated a claim under FOIA as to information that would help to "uncover[] deficiencies

or misfeasance in the *Government's investigations*." 541 U.S. 157, 173 (2004) (emphasis added).

The court below made this point in distinguishing the third case cited by petitioner (Pet. 18), *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224 (D.C. Cir. 2008). *See* App. 13a-14a. In *Multi AG Media*, the D.C. Circuit ordered disclosure of records identifying individuals who were selected by the U.S. Department of Agriculture to receive subsidies. *See* 515 F.3d at 1231. Although recipients of the USDA grants had a substantial privacy interest in their personal financial records, the court held that that interest was outweighed by the public interest in determining how recipients were selected by the agency. *Id.* at 1230-31.

As the court below explained, the public interest at issue in *Multi AG Media* is simply not presented by the Medicare records that petitioner seeks because, unlike USDA, HHS does not select the recipients of Medicare payments:

> The specific public interest in *Multi AG Media*, however, was enabling the public "to look at information the agency had before it when [determining whether a particular farm is eligible to participate in the benefit programs in the first place] so that the public can monitor whether the agency is correctly doing its job." *Id.* at 1231. In contrast, the Medicare claims data is irrelevant to whether physicians meet the Medicare enrollment requirements.

App. 14a (alteration in original). *See also Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (finding no cognizable public interest in disclosure of names, addresses, and payroll records of construction workers employed by

contractors on HUD-funded projects because those records offered no relevant information as to what the agency—as opposed to the contractors—was "'up to'").

Thus, even if the requested records demonstrated the quality of individual physicians whom Medicare beneficiaries choose for treatment (which, for the reasons listed by the court below, App. 9a-12a, they do not), they would offer no information as to how *HHS* is performing.

B. The D.C. Circuit Did Not Hold That There Was No Public Interest In Monitoring Medicare Spending.

Petitioner next asserts that the D.C. Circuit split from "a large number of courts" by purportedly rejecting the view that "there is a compelling public interest in monitoring how the government spends money under federal programs." Pet. 26. Again, however, the assertion distorts the holding of the D.C. Circuit. To the contrary, that court noted its own recent decision that there exists a public interest in data that would "allow[] the public to 'more easily determine whether [an agency] is catching cheaters and lawfully administering its subsidy and benefit programs.'" App. 14a (quoting *Multi AG Media*, 515 F.3d at 1232).

In this case, however, the D.C. Circuit made a factual determination that the specific records Checkbook requested were "irrelevant" to any such inquiry, and that Checkbook "ha[d] not provided any evidence of alleged fraud *the requested data would reveal*." App. 12a (emphasis added), 14a. Similarly, in this Court, Checkbook asserts that "Medicare is rife with potential for waste, fraud, and abuse." Pet. 30. Significantly, however, it does not explain how the precise number of procedures performed by every

individually identified physician treating Medicare beneficiaries would reveal such potential "waste, fraud, and abuse." As the D.C. Circuit explained, "the Medicare claims data is irrelevant to whether physicians meet the Medicare enrollment requirements," App. 14a, and thus will not serve to indicate whether physicians not entitled to Medicare reimbursement have improperly received it.

C. The D.C. Circuit Correctly Found That Physicians Have A "Substantial" Privacy Interest In Their Personal Financial Information.

Finally, Checkbook asserts that physicians' privacy interest in the requested records does not "clearly outweigh[] the public interest in disclosure," as required under FOIA Exemption 6. Pet. 33 (emphasis omitted). The D.C. Circuit's determination of physicians' privacy interest in the requested records was, however, in accord with settled law.

The court initially held that if physicians have a substantial—*i.e.*, greater than *de minimis*—privacy interest in the requested records, then it would be obligated to "balance the privacy interest in non-disclosure against the public interest." App. 5a (citing *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) ("*NARFE*")). That is precisely the analytical framework set forth by this Court. *See U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 762 (1989).

Here, as Judge Rogers agreed, there can be "little doubt that the disclosure of the requested material would implicate more than a *de minim[i]s* privacy interest." App. 20a (Rogers, J., concurring in part and dissenting in part). It is undisputed that the records that Checkbook seeks "would reveal the total

Medicare payments received by a physician for covered services." *Id.* at 6a. The D.C. Circuit and other federal courts of appeal have repeatedly held that such financial information implicates a substantial privacy interest.

In *Multi AG Media*, the D.C. Circuit explained that where business records—like those sought by Checkbook—"reveal financial information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects." 515 F.3d at 1228-29. The court thus held "that Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and 'the records would necessarily reveal at least a portion of the owner's personal finances.'" *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685 (D.C. Cir. 1976)). That holding is consistent with numerous prior rulings finding a substantial privacy interest in financial information. *See, e.g.*, *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1189 (8th Cir. 2000) ("An overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity fails to serve the exemption's purpose of protecting the privacy of individuals."); *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999); *Sheet Metal Workers Int'l Ass'n Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 995, 997-98 (10th Cir. 1995); *Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994); *Painting & Drywall Work Preservation Fund*, 936 F.2d at 1302-03; *Hopkins v. HUD*, 929 F.2d 81, 86-87 (2d Cir. 1991); *NARFE*, 879 F.2d at 875-76.

Indeed, the court below could well have gone further than it did in articulating physicians' privacy

interest in the requested records. First, it is noteworthy that AMA members treating Medicare beneficiaries for the past three decades have done so pursuant both to a court order and to an HHS pledge that the information in question would be kept confidential. *See FMA*, 479 F. Supp. at 1311 (permanently enjoining disclosure of physician-identifying Medicare reimbursement information); Freedom of Information; Modified Policy on Disclosure of Amounts Paid to Individual Physicians Under the Medicare Program, 45 Fed. Reg. 79,172, 79,172 (Nov. 28, 1980) ("The Secretary has considered the competing interests and has concluded that the public interest in the individually identified payment amounts is not sufficient to compel disclosure in view of the privacy interests of the physicians found compelling by the courts."). This Court has recognized the significance of such reliance interests to the Exemption 6 analysis. *See Ray*, 502 U.S. at 177 (finding that the Court of Appeals "gave insufficient weight to the fact that the interviews [the transcripts of which were subject to a FOIA request] had been conducted pursuant to an assurance of confidentiality").

Second, physicians who receive Medicare payments, unlike government employees or contractors, do not perform services for the government. They provide services for patients who are entitled to Medicare benefits. *See* 42 U.S.C. § 1395l(a) (Medicare benefits are paid when an "individual who is covered ... incurs expenses for services"); *id.* § 1395u(h)(1) (Medicare participating physicians "accept payment ... on an assignment-related basis for all items and services furnished to individuals"). The government, in other words, acts as the patients' insurer—not as the physicians' employer.

Finally, Checkbook's assertion that the requested records will not be revealing of physicians' "overall economic situation," Pet. 34, is simply inaccurate. Medicare payments compose, on average, some 25 percent of physicians' income. *See* GAO, Rep. No. GAO-05-119, *Medicare Physician Fees, Geographic Adjustment Indices Are Valid in Design, but Data and Methods Need Refinement* 4 (2005). However, in specialties that treat older patients primarily, the percentage of a physician's income from Medicare is significantly higher. Moreover, the percentage of physicians' income derived from Medicare is projected to increase dramatically in the next two decades as the average age of the population increases. *See* John K. Iglehart, *Medicare's Declining Payments to Physicians*, 346 New England J. Med. 1924, 1924 (2002). The records that Checkbook seeks thus will reveal an increasingly clear picture of physicians' overall financial situation in the coming years.

Physicians' privacy interest in the records sought by Checkbook is not, as Checkbook would have it, "quite limited." Pet. 33. To the contrary, that interest is substantial. *See* App. 6a-7a.

II. THERE IS AN INDEPENDENT GROUND FOR AFFIRMANCE NOT RAISED IN THE PETITION.

Quite apart from FOIA Exemption 6, the injunction entered against HHS in *FMA* remains in effect and bars the agency from disclosing the records sought by Checkbook. That injunction permanently enjoins HHS from disclosing "any list of annual Medicare reimbursements amounts, for any years, which would personally and individually identify ... providers of services." JA296 ¶ 2. It declares, moreover, that "[a]ny such disclosure of annual Medicare reimbursement amounts, for any years, in a manner that would

personally and individually identify the providers of services under the Medicare program" is "contrary to federal law." *Id.* The injunction therefore extends to the records requested by Checkbook, which would undisputedly "reveal the total Medicare payments received by a physician for covered services." App. 6a.

When an agency is subject to a lawfully entered injunction that requires the agency not to disclose particular records, that agency does not act "improperly" under FOIA by withholding the records in question. *See* 5 U.S.C. § 552(a)(4)(B) (district court may "order the production of any agency records *improperly withheld*") (emphasis added). This Court so held in *GTE Sylvania*:

> To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc., 445 U.S. 375, 387 (1980). Thus, pursuant to *GTE Sylvania*, HHS acted properly in withholding the requested records without regard to Exemption 6.

Although the D.C. Circuit majority elected not to reach this issue, App. 4a n.3, Judge Rogers did so. While disagreeing with the majority's Exemption 6 analysis, Judge Rogers found that the *FMA* injunction contains "broad language and its purpose to apply broadly is evident from the accompanying declaratory judgment and opinion." *Id.* at 33a. Because of the injunction's breadth, Judge Rogers

would have "remand[ed] the case to the district court for further proceedings on the scope of the injunction." *Id.* at 35a.

Subsequently, the Eleventh Circuit considered the effect of the *FMA* injunction in *Alley*, 590 F.3d 1195. Contrary to Checkbook's speculation, that court's ruling does not "conflict" with the opinion below. Pet. 15. Rather, it confirms that the records at issue are not subject to disclosure. As the *Alley* court explained:

> The language of the *FMA* injunction is broad. It permanently enjoins disclosure of "any list" of annual Medicare reimbursement amounts, "for any years," if disclosing it would identify [physicians in] the recertified class. The declaration paragraph of the injunction declares contrary to federal law "[a]ny such disclosure" of annual Medicare reimbursement amounts "in a manner that would personally and individually identify the providers of services." The repeated use of the word "any" makes clear that the scope of the injunction is not limited to the precise method of disclosure that was proposed in 1977.

590 F.3d at 1207 (footnote omitted); *id.* at 1201 n.9. Thus, "reasonably construed," the *FMA* injunction "covers the subject matter of" a FOIA request materially identical to Checkbook's, and "HHS did not 'improperly' withhold those records under the FOIA." *Id.* at 1210 (citing *GTE Sylvania*, 445 U.S. 375).

In short, the two federal appellate courts asked to decide whether HHS is required to disclose the records sought by petitioner have reached the same result, albeit for different reasons. Apart from the absence of any conflict in the Circuits, the decision of

the Eleventh Circuit strongly supports the conclusion that there is an independent ground for affirmance.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief in Opposition of Respondents U.S. Department of Health & Human Services, et al., this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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March 15, 2010

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No. 09-538

In the Supreme Court of the United States

CONSUMERS' CHECKBOOK, CENTER FOR THE STUDY OF SERVICES, PETITIONER

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that certain records of Medicare reimbursements to particular physicians were exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, as a "clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), because those particular records would, as a factual matter, reveal the physicians' personal income but would not be useful in assessing the administration of Medicare.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 554 F.3d 1046. The opinion of the district court (Pet. App. 37a-55a) is reported at 502 F. Supp. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2009 (Pet. App. 57a-58a). A petition for rehearing was denied on June 2, 2009 (Pet. App. 59a-60a). On August 13, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 30, 2009, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Medicare is health insurance for people age 65 or older" or who have certain disabilities or health conditions. Centers for Medicare & Medicaid Services (CMS), *What Is Medicare?*, Apr. 2008, http://www.medicare.gov/Publications/Pubs/pdf/11306.pdf. As the court of appeals recognized, "[w]hile CMS has certain responsibilities to promote quality healthcare for Medicare beneficiaries, it is not authorized to 'exercise any supervision or control over the practice of medicine or the manner in which medical services are provided.'" Pet. App. 8a (quoting 42 U.S.C. 1395).

Rather, CMS is responsible for enrolling health care providers and suppliers in Medicare. Medicare beneficiaries choose to obtain health services from those providers and suppliers (including physicians), and CMS makes payments to those providers and suppliers for those services. See 42 C.F.R. 424.505 (provider and supplier enrollment requirement); 42 C.F.R. 424.510 (provider and supplier enrollment procedures); 42 U.S.C. 1395a(a) ("Any individual entitled to insurance benefits under [Medicare] may obtain health services from any * * * person qualified to participate under this subchapter."); 42 U.S.C. 1395k, 1395*l* (entitlement to and payment of benefits). Based on a variety of factors, CMS determines and publishes fee schedules detailing the amounts it will pay any provider or supplier in a given area to perform various procedures. See generally 42 U.S.C. 1395*l*; 42 C.F.R. Pt. 414.

Incident to enrolling providers and suppliers, and to making payments for health services rendered to benefi-

ciaries, CMS maintains certain information about Medicare providers and suppliers, the diagnoses they have made, and the procedures they have performed for which they have claimed Medicare reimbursement. As relevant here, CMS has "data elements [that] include the diagnosis, the type and place of service and the Unique Physician Identifying Number (UPIN) of the physician who performed the services." Pet. App. 2a.

2. Petitioner is a "nonprofit consumer information and service resource" that offers, *inter alia*, a "guide to top doctors." See Consumers' Checkbook, http://www.checkbook.org (last visited Mar. 10, 2010) (emphasis omitted). Petitioner brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking certain data from Medicare claims records submitted by physicians in Illinois, Washington, the District of Columbia, Maryland, and Virginia during 2004. Pet. App. 2a; see also Consumers' Checkbook, http://www.checkbook.org (last visited Mar. 10, 2010) (listing petitioner's regions of coverage as, *inter alia*, Chicago Area, Puget Sound Area, and Washington D.C. Area). Petitioner's request seeks, as described above, the diagnosis, the type and place of service, and the UPIN of the physician who performed the service. Pet. App. 2a.

Using the information petitioner requested and the fee schedules CMS publishes, a person could determine an individual physician's annual income from Medicare reimbursement. Pet. App. 3a, 43a. Because the requested information—the physician-identifying data in particular—would reveal individual physicians' annual incomes from Medicare, the government objected to the release of the requested data as a "clearly unwarranted invasion of personal privacy," making the information

exempt from disclosure under FOIA Exemption 6. See 5 U.S.C. 552(b)(6).

The government also pointed out it could not release physician-identifying data because it had been permanently enjoined in *Florida Medical Ass'n* v. *Department of Health, Education & Welfare*, 479 F. Supp. 1291, 1311 (M.D. Fla. 1979) (*FMA*), from disclosing "annual Medicare reimbursements amounts, in a way that will identify individual Medicare providers and their amounts of reimbursements." The government explained that because it could not properly release such information under the *FMA* injunction, the data petitioner sought were not agency records "improperly withheld," 5 U.S.C. 552(a)(4)(B), and therefore the district court did not have authority to direct their release in a FOIA suit. See *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980).

The district court rejected both arguments and granted petitioner's motion for summary judgment, see Pet. App. 37a-55a, but stayed its order directing release of the requested records pending the government's appeal.

3. While the government's appeal was pending, the American Medical Association petitioned the court of appeals for, and was granted, leave to intervene to defend its member physicians' privacy interests and their interests as beneficiaries of the *FMA* injunction. The court of appeals reversed. Pet. App. 1a-35a.

a. The court first noted that "[i]f a substantial privacy interest is at stake," then it would need to undertake a case-specific inquiry under which it would "balance the privacy interest in non-disclosure against the public interest" in disclosure. Pet. App. 5a. On the privacy side of the balance, the court recognized that "phy-

sicians have a substantial privacy interest in the total payments they receive from Medicare for covered services." *Id.* at 7a. The court of appeals rejected petitioner's argument that no substantial privacy interest was at stake because disclosure might reveal only a physician's gross income or merely a portion of his income; the court also rejected the distinction petitioner sought to draw between "business activities" and "personal finances." See *id.* at 6a.

On the public interest side of the balancing test, the court of appeals closely examined, and rejected, each of petitioner's various theories. Petitioner first argued that disclosure would serve the public interest by revealing information about CMS's performance in enhancing the quality and efficiency of services provided under Medicare. Petitioner posited that high procedure volumes would indicate a high quality of care, and low volumes the opposite. The court of appeals rejected that view because the petitioners' argument rested on two incorrect premises: The court saw no meaningful consensus in the scientific literature that a physician's frequency of performing a procedure correlated with successful outcomes. And even if there were such a correlation, it would be a correlation with a physician's *total* number of procedures; yet the requested data would speak only to a physician's volume of Medicare-reimbursed procedures. Pet. App. 9a-10a.[1] Petitioner also

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[1] Similarly, petitioner suggested that the requested records could "be analyzed in conjunction with other treatment records" to assess quality of care. Pet. App. 11a (quoting Pet. C.A. Br. 24). The court of appeals assumed for the sake of argument that such analysis would be possible, but reemphasized that in such an analysis the particular procedure-frequency data petitioner sought (as distinguished from

posited that identification of physicians would allow public assessment of their quality. But the court of appeals recognized that "determin[ing] if Medicare is paying physicians with insufficient certifications, disciplinary histories or poor evaluations," *id.* at 10a, has nothing to do with procedure volume; a citizen can assess that question simply by knowing whether a suspect physician is enrolled in Medicare, and that information is readily available through other sources. *Id.* at 10a-11a.

Petitioner next argued that disclosure would serve the public interest by bringing Medicare fraud and waste to light. The court of appeals rejected that potential use as a basis for mandatory disclosure of the requested data because petitioner "ha[d] not provided any evidence of alleged fraud the requested data would reveal." Pet. App. 12a. The court of appeals found particularly apropos this Court's recognition that "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Id.* at 12a-13a (quoting *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991)).

Finally, petitioner argued that disclosure would illuminate HHS's compliance with its own transparency initiatives. The court of appeals disagreed, recognizing that "[t]he public does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives." Pet. App. 15a. Rather, the court of appeals explained,

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"other treatment records") would say nothing about whether CMS was performing its quality-promotion obligations. *Id.* at 11a-12a.

petitioner "seeks to use FOIA to compel CMS to *comply* with its transparency initiatives as [petitioner] views them, not to *evaluate* whether CMS is fulfilling its duties." *Ibid.* (emphasis added). In sum, the court concluded that "the requested data does not serve any FOIA-related public interest in disclosure." *Id.* at 16a.

Having found no "FOIA-related public interest," the court of appeals stated that it "need not balance the nonexistent public interest against every physician's substantial privacy interest in the Medicare payments he receives." Pet. App. 16a (citing *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("[w]e need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time"), cert. denied, 494 U.S. 1078 (1990)). The court further stated that "even were [it] to find a FOIA-related public interest in disclosure, it would be negligible at best and insufficient to outweigh the significant privacy interest in non-disclosure." *Id.* at 17a. Accordingly, the court held that disclosure of the requested data "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). Pet. App. 17a. The court of appeals therefore found it unnecessary to reach the question whether disclosure would be barred by the *FMA* injunction. *Id.* at 4a n.3.

b. Judge Rogers concurred in part and dissented in part. Pet. App. 17a-35a. She agreed that physicians had a "more than a *de minimus* [*sic*] privacy interest," but thought that interest was diminished by the fact the income at issue was paid by the government. *Id.* at 20a-22a. On the public interest side, Judge Rogers was persuaded that the requested records could be useful to assess the quality of services provided by physicians for Medicare beneficiaries, or perhaps reveal fraudulent or

wasteful claims. *Id.* at 22a-31a. Accordingly, she would have held Exemption 6 did not apply. *Id.* at 31a. Judge Rogers nonetheless expressed considerable skepticism about petitioner's argument that the *FMA* injunction did not bar release of at least some of the records petitioner sought. See *id.* at 31a-35a. She would have remanded the case to the district court for further proceedings on the scope of the *FMA* injunction, including an evaluation of whether it would be practical to segregate and release "at least * * * records pertaining to physicians who are not members of the recertified class covered by the [*FMA*] injunction." *Id.* at 35a.

c. The court of appeals denied petitioner's petition for rehearing en banc by a 6-to-3 vote. Pet. App. 59a-60a.

ARGUMENT

The court of appeals' decision is correct and rests on its fact-bound conclusion that the particular data petitioner seeks—the identification of the specific physicians who performed, and were reimbursed for, particular medical procedures—would not in fact be useful for any of the public-interest purposes petitioner posits. The court of appeals' decision reflects only the application of settled FOIA law and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals' application of FOIA Exemption 6 rests on settled principles of law. In considering that exemption, a court engages in a balancing test to determine whether the privacy interests at stake outweigh the public interest in disclosure. See generally *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (*Report-*

ers Comm.). As the court of appeals correctly stated, "[t]he only relevant public interest in disclosure 'is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding *of the operations or activities of the government.*"'" Pet. App. 7a (quoting *United States DoD* v. *FLRA*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *Reporters Comm.*, 489 U.S. at 775)). The court further cited established law that "the requested information must 'shed[] light on an agency's performance of its statutory duties,'" *ibid.* (quoting *Reporters Comm*, 489 U.S. at 773), and that "[t]he requesting party's intended use for the information is irrelevant to [the] analysis," *ibid.* (quoting *Reporters Comm*, 489 U.S. at 771).

Petitioner asserts that the court of appeals erroneously held that "the information requested must pertain to a specific statutory duty, rather than shed light on the functioning of the agency more generally." Pet. 13. But that is neither what the court of appeals said, nor what it did. Rather, it sought to determine whether the requested information would "contribut[e] significantly to public understanding of the operations or activities of the government." Pet. App. 7a (internal quotation marks, citations, and emphasis omitted). The court considered in detail petitioner's various "arguments regarding how the requested data will shed light on HHS's performance of its mission." *Id.* at 9a. The court of appeals' inquiry touched on both broad generalized goals (such as fighting fraud, see *id.* at 12a), as well as specific statutory mandates (such as promoting quality health care, see *id.* at 8a). And it addressed not only CMS's statutory obligations (see *id.* at 8a, 11a-12a (citing 42 U.S.C. 1395y(g) and 1395cc-3(b))), but also CMS's regulatory compliance (see *id.* at 11a (citing 42 C.F.R.

424.510)) and CMS's own initiatives (see *id.* at 14a-15a (citing CMS, Quality Initiatives - General Information, http://www.cms.hhs.gov/QualityInitiativesGenInfo/01_overview. asp (last visited Mar. 10, 2010))).

Overlooking all these aspects of the court of appeals' inquiry, petitioner focuses on the court's statement that "[t]he requested information must shed[] light on an agency's performance of its statutory duties" and its finding that "we fail to see how the requested information will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake." Pet. 14 (quoting Pet. App. 7a, 11a) (brackets in original). But the court was merely stating the oft-repeated, fundamental principle of FOIA law that to register on the public interest side of the balance, the requested information must "'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *DoD*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773); see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (same).[2] And the

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[2] Presumably petitioner does not suggest the case is certworthy entirely by virtue of the court of appeals' truncated recitation of the canonical formulation from *Reporters Committee* and *DoD*—that is, the court's mentioning "the agency's performance of its statutory duties" but eliding "what the[] government is up to." Nothing about the court of appeals' analysis was truncated, and it is only natural to speak of "statutory duties" because a government agency is "a creature of statute," and has "only those authorities conferred upon it by Congress." *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001); see also *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act * * * unless and until Congress confers power upon it"). Speaking of "statutory duties" is even more appropriate in discussing agency action under an intricate statutory scheme like Medicare.

court's conclusions about the usefulness of the particular data petitioner requested are correct (as discussed below), and would not in any event merit this Court's attention.

2. Petitioner also argues that the court of appeals erred in evaluating and balancing the particular public and privacy interests at issue here. Pet. 22-34. The court of appeals' decision is correct, and its fact-bound analysis does not merit further review.

a. On the privacy side of the balancing test, petitioner points out that "the requested records do not themselves reveal how much physicians are paid" and such "information must be derived by combining the requested data with other information." Pet. 33-34. But the fact that some arithmetic (using publicly available fee schedules) might be necessary to compute the precise amount of a physician's income is no privacy protection for the physician at all, and does nothing to vindicate Exemption 6's core purpose of promoting "the individual's control of information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763-764.

The court of appeals rightly rejected the argument—repeated now in the petition (at 34)—that little or no privacy interest was at stake because disclosure would not necessarily reveal a physician's "overall economic situation," but only the "portion" of income attributable to Medicare reimbursement. See Pet. App. 6a ("[T]he requested information need not reveal completely an individual's personal finances to implicate substantial privacy concerns.") (citing *Multi AG Media* v. *Department of Agric.*, 515 F.3d 1224, 1228-1229 (D.C. Cir. 2008)). That reasoning is sound because any physician who receives Medicare reimbursement—like any individual who works more than one job—retains a

strong privacy interest in the level of income he receives, and does not forfeit that interest simply because he has other sources of income.

The court of appeals also rejected—and petitioner also repeats (Pet. 34)—the argument that the privacy interests at stake are minimal per se because the income at issue pertains to "physician's receipt of government funds." See Pet. App. 5a. But the view that personal financial privacy is protected by Exemption 6, irrespective of the source of income, is settled law in the circuits;[3] petitioner does not contend otherwise or offer a cogent reason for rejecting that view.

b. On the public interest side of the balance, the court of appeals correctly rejected each of petitioner's hypothetical uses of the requested records to understand CMS's performance of its duties. Petitioner largely repeats the arguments made to, and rejected by, the court of appeals.

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[3] See *Painting & Drywall Work Preservation Fund, Inc.* v. *HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (withholding data under Exemption 6 because the records at issue involved accounting of hourly wages and net pay of workers on federally funded construction project); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) (protecting financial information of individuals receiving federal employee retirement benefits), cert. denied, 494 U.S. 1078 (1990); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *United States Dep't of the Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) ("[W]e conclude that workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures."); *Hopkins* v. *United States HUD*, 929 F.2d 81, 87 (2d Cir. 1991) (government contractors' payroll records were exempt from disclosure under Exemption 6 because "individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses * * * particularly where, as here, the names and addresses would be coupled with personal financial information").

i. Petitioner contends that the requested data would allow the public to monitor HHS's "efforts to promote quality in the provision of medical services." Pet. 22-23 (citing studies purporting to show a correlation between the number of times a physician performs certain procedures and the quality of those services). The court of appeals correctly disagreed with this as a factual matter: "[t]he medical community has not reached a consensus on whether the number of procedures performed by a physician correlates to the quality of those procedures." Pet. App. 9a (citing studies contrary to those cited by petitioner). The court also correctly recognized that "[e]ven assuming a strong correlation between volume and quality, the data [petitioner] requests will not indicate total volume because it does not include procedures performed by physicians for non-Medicare patients." *Id.* at 10a. Moreover, the number of procedures performed by a physician plays no part in CMS's determination whether a physician is eligible to be a Medicare provider.[4] Thus, the court of appeals correctly found that "[t]he data will not assist the public in determining whether Medicare is enrolling physicians who do not meet the enrollment requirements." *Id.* at 12a.[5]

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[4] The qualifications for a physician to participate in Medicare are state licensure and entering into a provider agreement. See 42 U.S.C. 1395x(r); 42 C.F.R. 424.510. CMS is itself prohibited from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. 1395.

[5] To the extent petitioner's theory of public interest relies on CMS's authority under 42 U.S.C. 1320a-7(b)(6) to exclude certain enrolled physicians from Medicare, it has waived that contention by not briefing it to the court of appeals. See Pet. App. 24a n.2 (Rogers, J., dissenting) (noting waiver). In any event, for the reasons discussed in the text, procedure volume is as unilluminating for Section 1320a-7(b)(6) exclusion purposes as any other.

ii. Petitioner also maintains that the requested data would allow the public to monitor CMS's efforts to combat fraud in Medicare, and cites reports indicating that "[w]aste, fraud, and abuse in the Medicare program have long been significant problems." Pet. 4, 24. Although those studies show that fraud has been a problem with Medicare payments generally, petitioner failed—as the court of appeals recognized—to "provid[e] any evidence of alleged fraud *the requested data* would reveal." Pet. App. 12a (emphasis added). That deficiency is fatal.

This Court has made clear that a public interest in the general subject matter of the requested records (at bottom, all petitioner asserts) is not a sufficient nexus to permit disclosure under the FOIA. Rather, the Court has emphasized the direct "nexus required between the requested documents and the purported public interest served by disclosure." See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004); see also *Senate of the Commonwealth of P.R.* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester must show that there is a public interest in the "specific information being withheld"). The Court has elaborated in particular that to establish a cognizable public interest in exploring misconduct, a FOIA requestor must make a "meaningful evidentiary showing." *Favish*, 541 U.S. at 175.

Petitioner has failed here to connect the number of procedures performed by specifically identified physicians (the "specific information being withheld") with a specific claim of fraud in the Medicare program. At best, plaintiff speculates that the requested data will show whether CMS is reimbursing providers for "un-

necessary procedures." Pet. 24. But the requested data cannot answer that question because whether a procedure is necessary depends entirely on the patient's condition—something the public obviously does not know, because it has no access to Medicare beneficiaries' private medical information.[6]

Petitioner also argues (Pet. 24) that disclosure of the disputed data "may also identify instances in which Medicare is paying claims to providers who are long deceased." But that purpose does not require physician-identifying information tied to number of procedures performed; any member of the public can use the directory of current Medicare physicians to determine whether a dead or retired physician is enrolled with

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[6] Notably, CMS uses much more than procedure volume to implement 42 U.S.C. 1395y(a)(1)(B), which precludes reimbursement for services that "are not reasonable and necessary for the prevention of illness." CMS's computer systems monitor claims data, and when aberrations are noted, a "medical review" is triggered to look at the underlying medical records to determine whether the care meets the "reasonable and necessary" criteria. See generally CMS, Medicare Medical Review Program, http://www.cms. hhs.gov/MedicalReviewProcess/Downloads/mrfactsheet.pdf. In addition, as the court of appeals recognized (see Pet. App. 8 n.4), quality peer review organizations, which do have access to underlying medical records, review whether services are reasonably necessary, the quality of services, and whether certain services can be performed more efficiently and economically. See 42 U.S.C. 1320c-3(a)(1). CMS has also undertaken a pilot program of payment recapture audits performed by private contractors, and the President recently announced an expansion of these efforts. See *President Obama Announces New Effort to Crack Down on Waste and Fraud*, Mar. 10, 2010, http://www.whitehouse.gov/the-press-office/president-obama-announces-new-effort-crack-down-waste-and-fraud. The data petitioner seeks would be at most a small component of those sorts of analyses, and certainly could not be used on their own to meaningfully analyze the quality of services reimbursed by Medicare.

Medicare. See Physician and Other Healthcare Professional Directory, http://www.medicare.gov/physician/search/physicianhome.asp (last visited Mar. 10, 2010). Indeed, the court of appeals recognized that this directory is all that the public needs to determine more generally "whether physicians with insufficient certifications, disciplinary histories or poor evaluations are enrolled in the Medicare program." Pet. App. 10a. CMS also maintains a publicly accessible website containing a list of physicians excluded from the Medicare program for misconduct. See Office of Inspector Gen., United States Dep't of HHS, http://oig.hhs.gov/fraud/exclusions/exclusions_list.asp (last visited Mar. 10, 2010). Such "'alternative sources of information available that could serve the public interest in disclosure' diminish [the] public interest value of disclosure." Pet. App. 10a (quoting *United States DoD Dep't of Military Affairs* v. *FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992)).

iii. Petitioner further contends that "the requested data would allow the public to monitor HHS's own self-proclaimed efforts to ensure greater transparency" in health care. Pet. 25. But the court of appeals' logic rejecting this argument is unassailable: the public knows the data exist but have not been released, and therefore "does not need the data itself to evaluate whether CMS's failure to disclose it constitutes a failure to comply with CMS's transparency initiatives." Pet. App. 15a.

iv. Finally, petitioner argues that "there is always a public interest in monitoring the government's expenditure of public funds." Pet. 25 (capitalization omitted). Even if that were true for FOIA purposes, petitioner does not explain why such an interest extends to the microscopic level of individual reimbursements for individual procedures to specifically identified physicians, or

why aggregate data that do not infringe on physician's financial privacy interests would not serve the same public interests.[7]

Moreover, petitioner's broad proposition is not supported by the cases it cites; each decision rests on much more than a naked, generalized interest in government expenditures. For example, in *News-Press* v. *United States DHS*, 489 F.3d 1173 (11th Cir. 2007), the Court ordered the disclosure of addresses (but not names) of households who received FEMA disaster relief funds—but did so only in the face "ample evidence" that the agency's response to Hurricane Frances may have been plagued with "fraud, waste, or abuse." See *id.* at 1192.[8] In *Multi AG Media*, *supra*, the records at issue did not merely relate to government expenditures—rather, they were the very information the agency had before it when determining whether a particular farm was eligible to

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[7] Indeed, there are abundant public data about Medicare expenditures. CMS has for many years compiled an annual Data Compendium giving key statistics about its programs and health care spending. The Data Compendium reports historic, current, and projected data on Medicare enrollment and Medicaid recipients, expenditures, and utilization. Data pertaining to budget, administrative and operating costs, individual income, financing, and health care providers and suppliers are also included. This Data Compendium now is available online as a service to researchers, policymakers, legislators, economists, and statisticians in health care. See CMS, Data Compendium 2009 Edition, http://www.cms.hhs.gov/DataCompendium/15_2009_Data_Compendium.asp.

[8] Petitioner's citation (Pet. 28 n.20) of *Cochran* v. *United States*, 770 F.2d 949 (11th Cir. 1985), is even less helpful, because it involved proven acts of "intentionally diverting government property," *id.* at 956. Similarly, there was established irregularity in *Aronson* v. *HUD*, 822 F.2d 182 (1st Cir. 1987), which concerned the "disclosure and consequent disbursement of funds the government [concededly] owe[d] its citizens," *id.* at 185.

participate in (or was complying with) the government's benefit program. See 515 F.3d at 1230-1232. By contrast here, the number of procedures performed by an individual physician has no bearing upon the physician's eligibility to become a Medicare provider or his entitlement to reimbursement for a procedure. Petitioner's broad proposition is simply mistaken, and the court of appeals correctly resolved this case on its own facts.

3. The petition anticipated the possibility of a circuit split between the decision below and *Alley* v. *United States HHS*, 590 F.3d 1195 (2009), which was pending on the government's appeal to the Court of Appeals for the Eleventh Circuit at the time the petition was filed. See Pet. 15.[9] No split materialized: *Alley* did not address the Exemption 6 issue here, holding instead that the requested records were properly withheld in light of the permanent injunction in *FMA*. *Alley*'s reasoning (which would apply equally to this case) relied on this Court's holding in *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384 (1980), that information may not be obtained under FOIA when the agency holding the material has been enjoined from disclosing it. See 590 F.3d at 1203. Thus, not only is there no disagreement in the circuits, but two different courts of appeals have found independently sufficient reasons to deny the relief petitioner seeks. The obstacle that the *FMA* injunction presents to petitioner's ultimate success is an additional reason why further review is unwarranted.

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[9] On the government's application, this Court stayed the district court's order directing release of the requested records in *Alley* pending appeal. See *United States HHS* v. *Alley*, No. 08A794 (Mar. 25, 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

(4)

No. 09-538

Supreme Court, U.S.
FILED
MAR 30 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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CONSUMERS' CHECKBOOK,
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UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The D.C. Circuit's holding that there is zero public interest in the disclosure of records illuminating how the government reimburses private physicians through the Medicare program conflicts with the fundamental mission of FOIA and the case law interpreting it. That holding also has potentially staggering consequences. As the past year's vigorous debate over health insurance demonstrates, we live in an era of ever-expanding government expenditures, and huge programs such as Medicare, which already spends over $400 billion each year, are projected to only grow. The D.C. Circuit's holding, which would deny the public the ability to as-

sess for itself how the Department of Health and Human Services disburses Medicare funds, could not come at a worse time. It would set a dangerous precedent and should be reversed.

I. THE REQUESTED DATA WILL SHED LIGHT ON HOW THE GOVERNMENT SPENDS BILLIONS OF TAXPAYER DOLLARS IN THE MEDICARE PROGRAM

A. The D.C. Circuit Committed An Error Of Law That Was Material To The Outcome

The D.C. Circuit squarely held that a FOIA requester must link the requested information to a specific statutory agency duty in order to establish a public interest cognizable under FOIA's Exemption 6. Rather than defend this holding—which is indefensible—the government and the American Medical Association (AMA) attempt to minimize it, arguing that "that is neither what the court of appeals said, nor what it did." Gov't Opp. 9, *see also* AMA Opp. 10.

Respondents are incorrect. The D.C. Circuit plainly held that a connection to a specific statutory agency duty was required. Pet. App. 11a-12a. That error was material to the outcome: the D.C. Circuit rejected petitioner's argument that the requested data will further the public interest in information about the quality of care within Medicare on the ground that petitioners had not tied the requested data to a specific agency duty. *Id.* The court stated as follows:

> [Petitioner] argues that the requested data will indicate the quality of care being provided by Medicare-enrolled physicians and thereby permit the public to assess how well [the Centers for Medicare and Medicaid Services (CMS)] is fulfilling its statutory duty to promote quality.

> But we fail to see how the requested data will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake.

Pet. App. 11a. After the quoted passage, the D.C. Circuit reviewed specific statutory duties and concluded that the data would not shed light on the government's compliance with any of those duties. *Id.* at 11a-12a. The D.C. Circuit's holding is clear: because the requested information was not tied to a specific statutory duty, there could be no public interest in its disclosure. The D.C. Circuit's error consisted not in a mere "truncated recitation of the canonical formulation" of the relevant test (Gov't Opp. 10 n.2), but in its grafting a new requirement with no basis in this Court's precedent and then deciding the case before it on the basis of its new rule, with profound real-life consequences.

The D.C. Circuit's holding sets a dangerous precedent. Agencies often act pursuant to general authorities, not specific, narrow statutory mandates, as in this case, where CMS has a general duty to promote quality in the Medicare program. *See* Pet. 19-22. Holding that there is no public interest in the release of data in the absence of a specific statutory duty makes no sense and runs contrary to FOIA's " 'general philosophy of full agency disclosure.' " *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-361 (1976). The D.C. Circuit's holding in this case threatens to undermine this philosophy, and should be reversed.

B. The Requested Information Sheds Light On The Government's Compliance With Its Duties To Promote Quality And Prevent Fraud In Medicare

In addition to attempting to minimize the error committed by the D.C. Circuit, respondents argue that petitioner failed to establish a sufficient nexus between the requested data and the asserted public interest. Although such a nexus must exist, *see National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172-173 (2004), respondents and the D.C. Circuit would require a showing so detailed that few FOIA requesters could ever hope to satisfy it. This unprecedented requirement of a heightened showing required by the D.C. Circuit—and defended by respondents—has no basis in precedent and runs contrary to FOIA's objective of openness in government.

The D.C. Circuit held that petitioner had failed to link the requested data to the asserted public interest in two respects. First, the court held that petitioner's claim that the requested data will shed light on the quality of care in Medicare "rests on the assumption that the frequency with which a physician performs a medical procedure indicates the quality of the procedure." Pet. App. 9a; *see also* Gov't Opp. 13; AMA Opp. 10. The court did not deny that that position has substantial support in scientific literature. Nonetheless, it treated as dispositive that "[t]he medical community has not reached a consensus" on the point, and that the requested information would not reveal the *total* volume of procedures performed by physicians (because it would not include procedures performed for non-Medicare patients). Pet. App. 9a-10a; *see also* Gov't Opp. 13; AMA Opp. 10. Second, the D.C. Circuit held that a Government Accountability Office (GAO) report

stating that "[s]ince 1990, GAO has considered Medicare at high risk for fraud, waste, abuse, and mismanagement"[1] was somehow insufficient to "raise a cognizable public interest under FOIA in verifying that CMS is adequately detecting fraud" (Pet. App. 13a; *see also* Gov't Opp. 14-15; AMA Opp. 13-14).

Both conclusions lack support in the FOIA case law. Although this Court has stated that a "totally unsupported suggestion" of government misfeasance is not sufficient to invoke a public interest under FOIA, *see Department of State* v. *Ray*, 502 U.S. 164, 179 (1991), that is hardly the situation here. The high incidence of fraud in Medicare is a matter of public record. *See* Pet. 4-5 & nn.3-6. The fact that the GAO—a government agency—has recognized the severe danger of Medicare fraud should be dispositive.

The court similarly erred in turning aside petitioner's argument that the requested data will shed light on CMS's efforts to promote quality in the Medicare program. Legitimate scholarship—including a recent paper by the White House Council of Economic Advisers—supports the view that there is a strong correlation between quantity and quality of medical procedures performed. *See* Pet. 6-7, 22-24 (citing Executive Office of the President, Council of Economic Advisers, *The Economic Case for Health Care Reform* 16 (June 2009), *at* http://www.whitehouse.gov/assets/documents/CEA_Health_Care_Report.pdf). Nothing in FOIA requires petitioner to establish to a scientific certainty that quantity correlates to quality for the data to be

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[1] GAO, *Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised*, GAO-06-813 at *Highlights* (Sept. 2006), *at* http://www.gao.gov/new.items/d06813.pdf.

relevant to the public interest. The fact that there is legitimate debate on the point should suffice to establish an entitlement to the data.

More fundamentally, the D.C. Circuit's ruling is not faithful to the precept that, under FOIA, it is for the *public* to decide whether information in government files provides a basis for a call to action or reform. The very reason for requesting data under FOIA is often to allow the public to evaluate whether additional steps are necessary to further the public interest. Nor must a requester prove that the requested information will establish conclusively that the government has failed in one of its duties. Since the requested information is not already in the public domain, requesters cannot be expected to offer detailed evidence of what the data will show. It is for this reason that the data need only "*shed*[] *light*" on the government's activities, *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 773 (1989) (emphasis added), consistent with FOIA's purpose to " 'open agency action to the light of public scrutiny,' " *Rose*, 425 U.S. at 361. Indeed, the D.C. Circuit itself has previously focused on "the *incremental* value of the specific information being withheld." *Schrecker* v. *Department of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added); *see also* Pet. App. 22a-23a (Rogers, J. dissenting).

Under the proper standard, there can be little doubt that the requested data will shed light on CMS's activities. Data tying procedures performed to individually-identified physicians will allow the public to determine whether CMS is issuing reimbursements for procedures for which those physicians have insufficient training or certification. In addition, the number of procedures performed by a given doctor is at least relevant to CMS's efforts to promote quality in Medi-

care. The government acknowledges that procedure volume is at least a component of the quality analysis that CMS itself performs. *See* Gov't Opp. 15 n.6 ("CMS uses *much more than* procedure volume to implement 42 U.S.C. 1395y(a)(1)(B), which precludes reimbursement for services that 'are not reasonably and necessary for the prevention of illness.' "(emphasis added)). It follows that procedure volume "sheds light" on CMS's activities. *Reporters Comm.*, 489 U.S. at 773.

Knowing the number of procedures performed by particular doctors in a given time period will also shed significant light on CMS's efforts in combating fraud in Medicare, and on how successful those efforts have been. With the requested data, petitioner will be able to establish, for example, the number of procedures billed using identification numbers of doctors who are unlicensed or even dead. Such billing information surely sheds more light on the government's efforts to combat fraud than does the mere knowledge that a deceased physician is enrolled in the Medicare program. *See* Gov't Opp. 15-16. Data on the number of procedures billed in a given time period will also show if a physician is billing for procedures outside of his practice area or billing for an inordinate number of procedures in a given time period (surely, billing for 200 heart bypass procedures a day would be a strong indicator of fraud, *e.g.*). For these reasons, it is clear that the requested data will "shed[] light" on CMS's efforts to promote quality and prevent fraud in Medicare. Nothing more is required.

Congress's recent enactment, as part of the new healthcare reform law, of a provision permitting the release of Medicare claims data also undermines the D.C. Circuit's holding that there is zero public interest in release of that data. Section 10332 of the Patient Protec-

tion and Affordable Care Act (PPACA) calls for the release of "claims data under [Medicare] parts A, B, and D for items and services furnished under such parts for one or more specified geographic areas and time periods." Pub. L. No. 111-148 (H.R. 3590), § 10332, 124 Stat. 119, 968 (2010) (permitting release of claims data to "qualified entities ... for the evaluation of the performance of providers of services and suppliers;" imposing restrictions upon qualified entities on the uses to be made of the data). The enactment of Section 10332 of PPACA, which takes effect in 2012, reflects Congress's understanding that the release of such data is in the public interest. This Congressional judgment is irreconcilable with the D.C. Circuit's finding of no public interest in this case.

II. The Great Public Interest In Disclosure Clearly Outweighs Any Privacy Interest In The Data

Once the compelling public interest in disclosure of the requested records is recognized, it is clear that it greatly outweighs any privacy interest at issue. Exemption 6 to FOIA exempts records from disclosure only if disclosure "would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). The balance is thus tilted heavily in favor of disclosure. *See Ray*, 502 U.S. at 177.

Any privacy interest in the requested data is attenuated. First, the requested information pertains only to the receipt of government funds.[2] The re-

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[2] The cases cited by the government do not establish that the fact of government funding is irrelevant to the privacy analysis. *See* Gov't Opp. 12 n.3. Those cases involved a particular concern

quested data also does not reveal physicians' take-home earnings, total income, or net income after expenses. Indeed, the AMA itself states that "Medicare payments compose, on average, some 25 percent of physicians' income." AMA Opp. 17 (citing GAO, *Medicare Physician Fees, Geographic Adjustment Indices Are Valid in Design, but Data and Methods Need Refinement*, GAO-05-119, at 4 (2005)). Thus, at most the requested data can be used to derive an uncertain fraction of physicians' earnings. Any ensuing invasion of physicians' privacy does not clearly outweigh the compelling public interest in understanding how the government spends taxpayers' money in a program as susceptible to fraud as Medicare.

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with disclosure of the home addresses of persons receiving funds from the government that is not present here. *See Painting & Drywall Work Preservation Fund, Inc.* v. *Department of Housing & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) ("the records at issue here involve ... names, addresses, [and] a full weekly accounting of hourly wages, hours worked, deductions, and net pay"); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (finding privacy interests in names and home addresses of federal retirees likely to become targets of marketing campaigns "for all the special goods, services, and causes likely to appeal to financially secure retirees"); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *Department of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) (exhibiting concern with records tying workers' names and home addresses to payroll figures); *Hopkins* v. *Department of Housing & Urban Dev.*, 929 F.2d 81, 87 (2d Cir. 1991) ("individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses").

III. The Florida Injunction Has No Application To The Majority Of The Records In This Case Even If Read Broadly

Respondents point to an injunction entered by a Florida district court in 1979 as an independent reason for the Court to deny review in this case. AMA Opp. 17-20; Gov't Opp. 18; *see Alley* v. *Department of Health & Human Servs.*, 590 F.3d 1195 (2009) (concluding that the Florida injunction bars disclosure of similar records). That argument is unavailing.

First, the panel majority in the D.C. Circuit did not address the injunction. *See* Pet. App. 4a n.3. It cannot be presumed that the D.C. Circuit would conclude that the injunction bars disclosure of the records requested at all.

Second, even read broadly, the Florida injunction *at most* bars disclosure of information relating to the class certified in that case—Florida physicians and AMA members. *See* C.A.J.A. 295-296; *Florida Med. Ass'n, Inc.* v. *Department of Health, Educ. & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979) (accompanying opinion). The injunction therefore has no application to the majority of the records requested in this case. The majority of physicians whose data is at issue in this case are not members of the recertified class to which the Florida injunction applies. Petitioner requested data pertaining to physicians practicing in Washington, D.C., not those licensed to practice in Florida. Further, according to one source, only 26 percent of licensed physicians in the United States were members of the AMA in 2004, and respondents have not shown otherwise. Peck, *AMA: Membership Bounces Back Slightly*, MedPage Today (June 12, 2006), *at* http://www.medpagetoday.com/PublicHealthPolicy/PracticeManagement/

3516; *see* Pet. C.A. Br. 43 & n.29. It follows that the Florida injunction does not even address the majority of records at issue in this case. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); Pet. App. 35a (Rogers, J., dissenting). Reversal of the D.C. Circuit's judgment will result in the immediate release of a majority of the records at issue here, which plainly fall outside the scope of the Florida injunction.

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The D.C. Circuit's ruling would set a dangerous precedent for Exemption 6 law and FOIA jurisprudence generally. It would undermine the basic philosophy of openness reflected in FOIA and erect, without foundation, a possibly insurmountable hurdle in many cases to disclosure of needed information regarding the workings of the government. Review by this Court is needed to ensure that the public may inform itself about the government's stewardship of public funds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2010